

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION
4 LUMINATI NETWORKS LTD.) (CIVIL ACTION NO.
5) (2 :19-CV-395-JRG
6) (MARSHALL, TEXAS
7 VS.) (NOVEMBER 19, 2020
8) (10:05 A.M.
9 TESO LT, UAB, ET AL.) (

12 TESO LT, UAB, ET AL.) (

13) (CIVIL ACTION NO.

14) (2:20-CV-73-JRG

15 VS.) (MARSHALL, TEXAS

16) (

17 LUMINATI NETWORKS LTD.,) (NOVEMBER 19, 2020

18 ET AL.) (10:05 A.M.

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1 [REPORTER'S NOTE: During the following
2 proceedings, there were disruptions in the audio as a
3 result of it being held by videoconferencing. These places
4 are noted in the transcript.]

10:05:35 5 * * *

10:05:35 6 THE COURT: Good morning, counsel. This is Judge

10:05:51 7 Gilstrap. Can everyone see and hear me?

10:05:57 8 MR. MANN: Yes, Your Honor.

10:05:58 9 MR. SMITH: Yes, Your Honor.

10:05:59 10 MR. HARKINS: Yes, Your Honor.

10:06:02 11 THE COURT: All right. We're here this morning on

10:06:07 12 matters in Case No. 2:19-CV-395, Luminati versus Teso, et

10:06:14 13 al. We're also here on matters in Case No. 2:20-CV-0073,

10:06:23 14 Teso versus Luminati.

10:06:28 15 Let me begin by asking for announcements as to who

10:06:31 16 is participating virtually as a part of these motions this

10:06:39 17 morning.

10:06:39 18 Let's begin with Luminati. Let me ask for

10:06:43 19 announcements one at a time. And perhaps if there's some

10:06:48 20 counsel who could announce for everybody on the Luminati

10:06:51 21 side, we would avoid the risk of people talking over each

10:06:55 22 other.

10:06:55 23 So with that, let me have announcements of who's

10:07:01 24 present.

10:07:03 25

10:07:06 1 MS. DERIEUX: Your Honor, this is Elizabeth
10:07:07 2 DeRieux for Luminati --
10:07:07 3 THE COURT: Ms. DeRieux, I can't -- I can't hear
10:07:08 4 you. Ms. DeRieux, you're -- you're a faint voice in a
10:07:10 5 distant canyon. Please speak up.
10:07:14 6 MS. DERIEUX: Yes, sir.
10:07:15 7 This is Elizabeth DeRieux. I'm here on behalf of
10:07:18 8 Luminati. With me today by video is Bob Harkins, and he
10:07:25 9 will be speaking for Luminati in the hearing today. Also
10:07:27 10 attending by telephone, myself, Sunny Cherian, Ron
10:07:34 11 Wielkopolski, and Mark Mann. And we are ready to proceed.
10:07:42 12 THE COURT: All right. Let me ask for a similar
10:07:45 13 announcement regarding the Teso parties.
10:07:47 14 MR. SMITH: Your Honor, for the Teso parties,
10:07:50 15 Michael Smith. And I'd like to defer the full announcement
10:07:53 16 to Mr. Steven Callahan so that he can correctly identify
10:07:56 17 all the people that are on.
10:07:57 18 THE COURT: All right. Mr. Callahan.
10:07:59 19 MR. CALLAHAN: Good morning, Chief -- Good
10:08:04 20 morning, Chief Judge Gilstrap. Steven Callahan is here,
10:08:04 21 and with me my colleagues, Jorde Scott and Mitchell Sibley,
10:08:11 22 and we're all on the videoconference.
10:08:12 23 THE COURT: All right. Are there persons
10:08:14 24 attending by telephone who I don't see on the monitor in
10:08:16 25 front of me?

10:08:17 1 MR. CALLAHAN: Not from our side, Your Honor.

10:08:21 2 THE COURT: Ms. DeRieux, I -- I'm going to ask you

10:08:23 3 to run through the people you announced for earlier,

10:08:27 4 because in adjusting the sound on this end, we heard the

10:08:30 5 end of your announcement, but I didn't hear the beginning

10:08:33 6 of your announcement. So just for my own benefit, would

10:08:37 7 you give me those names and identities again, please?

10:08:42 8 MS. DERIEUX: Yes, sir. This is Elizabeth DeRieux

10:08:44 9 for Luminati. Robert Harkins is appearing by video, and

10:08:50 10 he'll be speaking for Luminati today at the hearing. Also

10:08:54 11 attending by telephone, Sunny Cherian, Ron Wielkopolski,

10:08:58 12 and Mark Mann.

10:09:01 13 THE COURT: Thank you.

10:09:02 14 Counsel -- counsel, at the out -- counsel, at the

10:09:08 15 outset, let me tell you that I have my schedule allocated

10:09:15 16 today so that we have two hours to cover what we can on

10:09:18 17 these pending motions. Anything we don't get covered by

10:09:21 18 way of oral argument by noon Central Time today, I will

10:09:27 19 take up and consider on the briefing and on the papers and

10:09:30 20 get you orders accordingly.

10:09:32 21 We're going to follow this series of arguments or

10:09:38 22 this order of events today. We're going to start with

10:09:42 23 Luminati's motion to dismiss third amended counterclaims

10:09:47 24 and third amended third-party complaint. That's Document

10:09:51 25 102 in the 395 case.

10:09:55 1 I'll then hear Luminati's motion in the
10:10:00 2 alternative to sever and stay Defendants' counterclaims,
10:10:05 3 also in the 395 case.

10:10:06 4 Third, we'll take up the motion to compel
10:10:10 5 interrogatory responses, Document 150, in the 395 case.

10:10:15 6 And last on my list today is the motion to dismiss
10:10:23 7 brought by Luminati, Document 20, in the 73 case.

10:10:27 8 So that's the order in which I intend to hear
10:10:32 9 argument this morning.

10:10:40 10 And I'm also, just given that we're doing this
10:10:44 11 virtually, to make sure that we have a clear record, I'm
10:10:47 12 going to ask each person who speaks throughout the process
10:10:51 13 today to begin with identifying yourself by name. That --
10:10:56 14 I would much rather have that done more often than needed
10:11:02 15 repetitively than overlook somebody in the record and later
10:11:05 16 not be sure who argued.

10:11:07 17 So with that, let's begin with Luminati's motion
10:11:09 18 to dismiss third-party amended count -- counterclaims and
10:11:15 19 third amended third-party complaint.

10:11:17 20 Let me hear from the moving party, Luminati,
10:11:20 21 first.

10:11:21 22 MR. HARKINS: Robert Harkins on behalf of
10:11:25 23 Luminati. Thank you, Your Honor.

10:11:25 24 Your Honor, we have provided the Court and the
10:11:29 25 other side with a set of presentation materials by way of

10:11:33 1 slides. And if -- if Your Honor has a copy of those --

10:11:37 2 THE COURT: I do --

10:11:39 3 MR. HARKINS: -- it's -- there are two -- two

10:11:42 4 sets, and -- and as Your Honor has -- it's the set of --

10:11:48 5 there is one set that starts off and a cover sheet that

10:11:53 6 says: Motion to Dismiss Third Amended Counterclaims. And

10:11:56 7 that set will cover the first three items in the order

10:11:58 8 that -- that Your Honor has listed for today.

10:12:00 9 THE COURT: I've got them.

10:12:02 10 MR. HARKINS: The second set of slides is about --

10:12:06 11 is about the fourth. So we can set that aside. Thank you.

10:12:08 12 So if -- if Your Honor turns to Slide 2 of that

10:12:11 13 set, it just sets out the -- the ECF numbers that go with

10:12:14 14 the three motions. And then starting at Slide 3 is the

10:12:17 15 cover page for this first argument we're making about

10:12:21 16 dismissing the counterclaims.

10:12:22 17 On Slide 4, we set out what the scope of the

10:12:27 18 argument is. And what you will note is that of these

10:12:31 19 counterclaims, there are eight counterclaims that were made

10:12:38 20 by Defendants we refer to as Teso. And of those, we -- we

10:12:42 21 did not move to dismiss the non-infringement and invalidity

10:12:46 22 counts, which are 6 and 7, but the rest are encompassed by

10:12:50 23 the motion.

10:12:52 24 In -- essentially, these claims, as we note at the

10:12:57 25 bottom, the overall reasons are most of these are -- the

10:13:00 1 first four counts are -- they're monopolization claims,
10:13:07 2 they're antitrust, and they're barred by the
10:13:10 3 Noerr-Pennington Doctrine.

10:13:11 4 And in general, all of these Claims 1 through 5
10:13:14 5 and 8 fail to satisfy pleading requirement under 12(b) (6)
10:13:19 6 at least and others, and -- and that's independent reasons
10:13:22 7 why those -- they should be dismissed.

10:13:25 8 So if we go to our Slide 5, it just sets out the
10:13:31 9 standard under Federal Rule of Civil Procedure 8. And the
10:13:37 10 citation is from the Iqbal case which Your Honor is very
10:13:40 11 familiar with. And we need to have plausible claims.

10:13:47 12 We continue to discuss the -- the basic legal
10:13:50 13 setting on Slide 6, saying you have to have facially
10:13:54 14 plausible claims, and you have to have -- if you don't --
10:13:58 15 if you can't show plausibility, including overcoming the
10:14:02 16 Noerr-Pennington Doctrine by proving sufficiently plausible
10:14:11 17 facts that -- which prove sham litigation, then 12(b) (6)
10:14:16 18 dismissal is appropriate. And that is the -- well, it's
10:14:18 19 the Miller v. BAC Home Loan Servicing case, but also the
10:14:20 20 Industry Models case that we cite on -- at the bottom of
10:14:23 21 Slide 6.

10:14:24 22 As we say on Slide 7, Federal Rule of Civil
10:14:34 23 Procedure 9(b) also applies, and specifically to
10:14:37 24 unenforceability because it is an inequitable conduct claim
10:14:39 25 must be pled with particularity. And we don't think that

10:14:43 1 that's been met here.

10:14:44 2 So starting at Slide 8, essentially what's going
10:14:47 3 on here, and we wanted Your Honor to understand, that all
10:14:49 4 of the claims about monopolization are basically some
10:14:53 5 version of -- some version of -- that Luminati is enforcing
10:14:58 6 its patent rights. And as a result of that, the -- the --
10:15:04 7 Teso believes that they're monopolizing them, and that --
10:15:08 8 that's a problem.

10:15:09 9 But, of course, as we all know, patent is a legal
10:15:13 10 monopoly right. So we run into Noerr-Pennington all the
10:15:15 11 time in these types of cases where parties try to say, oh,
10:15:19 12 you know, enforcing your patent gives you a monopoly so
10:15:23 13 you're a monopolist.

10:15:24 14 But the patent right itself creates a legal
10:15:27 15 monopoly, and that -- that cannot possibly -- that would be
10:15:30 16 an irresolvable conflict in -- in our laws of the United
10:15:34 17 States if we allowed for those two things to -- to co-exist
10:15:37 18 every time someone brings a patent claim. They're subject
10:15:41 19 to antitrust violation claims if they don't win the case.

10:15:44 20 So the general rule under Noerr-Pennington is you
10:15:47 21 can't do that. I mean, that's -- it has to be more than
10:15:50 22 you are suing someone, and -- and we disagree with you. We
10:15:53 23 don't think we infringe. We think your patent is invalid.
10:15:57 24 And you should know that, and, therefore, you know,
10:15:58 25 that's -- that's our basis for our claim. That doesn't

10:16:00 1 work.

10:16:01 2 So on Slide 8, we just show that the essence of
10:16:05 3 this claim is just -- it's just in this idea that the
10:16:08 4 patent lawsuits that Luminati is bringing are -- are shams.
10:16:12 5 That -- that is the basis. That's in Paragraph 127 of the
10:16:17 6 amended -- of the amended counterclaims.

10:16:20 7 And if we go to Slide 9, we just further show that
10:16:26 8 all of the activities that are being alleged to support the
10:16:30 9 antitrust claims are all versions of enforcing patent
10:16:33 10 rights, and -- and specifically enforcing patent rights by
10:16:38 11 the -- the patents that are being asserted in litigation in
10:16:41 12 this court. And that is the basis of the -- the entire
10:16:45 13 basis of why we got the first four counts of these
10:16:49 14 counterclaims.

10:16:49 15 THE COURT: Mr. Harkins?

10:16:50 16 MR. HARKINS: Yes.

10:16:51 17 THE COURT: And for those present, I've found in
10:16:53 18 these virtual context, if I hold up my hand, you sometimes
10:16:56 19 can see it before you can hear me. So to avoid talking
10:17:01 20 over each other, if I'm going to interject, I'll try to
10:17:05 21 hold up my hand and let you know that I have a question.

10:17:08 22 At this juncture, let me ask you this,
10:17:11 23 Mr. Harkins. Isn't Noerr-Pennington an affirmative
10:17:13 24 defense? And if it is, why is it something that's
10:17:18 25 appropriate to rule on affirmatively at the pleading stage?

10:17:25 1 Said another way, why isn't this -- why isn't your position
10:17:29 2 on this effectively premature?

10:17:31 3 MR. HARKINS: Thank you, Your Honor.

10:17:32 4 So when -- so the reason for this is -- it's a
10:17:38 5 little bit like an anti-slap situation, which is -- again,
10:17:43 6 that would require -- that would allow every patent
10:17:46 7 Defendant to -- to file an antitrust claim and have -- and
10:17:50 8 take discovery on it and have this ride -- go all the way
10:17:56 9 through the process and then be, you know, subject to
10:17:58 10 dismissal at the summary judgment stage.

10:18:01 11 And we are -- and so that is not -- and so what
10:18:05 12 happens with the Noerr-Pennington defense is Courts will --
10:18:11 13 will dismiss it at this stage unless there are facts, facts
10:18:16 14 that will prove -- plausibly prove that this is a sham
10:18:20 15 litigation.

10:18:21 16 So the difference here is it can be asserted as
10:18:26 17 a -- as an affirmative defense, but it's also been used on
10:18:30 18 motions to dismiss and has been relied upon by Courts to
10:18:34 19 dismiss claims under 12(b) (6). And I think that was the
10:18:37 20 law that we cited to you earlier on -- that was where I
10:18:43 21 started off on Slide 6 of our materials, which says that
10:18:46 22 this dismissal is appropriate for antitrust under
10:18:49 23 Noerr-Pennington as a 12(b) (6) motion. And that was the
10:18:52 24 Miller v. BAC Home Loans case and the Industry Models case
10:18:58 25 that are cited on that slide.

10:18:59 1 And there's a good reason for that, because,
10:19:01 2 otherwise, every single case that's a patent case will
10:19:05 3 have -- everybody will say every case is a sham, and the --
10:19:08 4 the Plaintiff should know better than to bring these cases,
10:19:10 5 and we're going to take a bunch of discovery. And there's
10:19:13 6 no plausible facts that show that this is a sham.

10:19:16 7 And if -- and if they could plead -- meet
10:19:20 8 particularity pleading requirements to indicate that
10:19:23 9 there's a possibility that they're going to win this claim,
10:19:27 10 then that would be different.

10:19:28 11 But we have a facially valid patent -- that is the
10:19:35 12 presumption. And we have -- are presumed to have a good
10:19:38 13 faith basis to bring the complaint unless it's shown --
10:19:40 14 proved otherwise.

10:19:43 15 A better way of dealing with this kind of a
10:19:45 16 situation is if they win and they show at that time through
10:19:48 17 this litigation we had no basis to ever believe that we
10:19:53 18 could have brought this claim in good faith, they always
10:19:56 19 have the right to bring antitrust claims at that point.

10:20:00 20 And that -- that makes sense. That order makes sense. It
10:20:03 21 doesn't clutter every patent case with a -- with a
10:20:05 22 monopoly -- with an antitrust claim.

10:20:06 23 So that doesn't -- you know, dismissing this claim
10:20:10 24 from this -- from this case does not deprive them, if they
10:20:14 25 could somehow actually plead plausible facts later, from

10:20:19 1 bringing these claims. But if they're going to do it now,
10:20:21 2 they need to state -- come out with those facts now that
10:20:23 3 actually support that this overcomes the presumption that
10:20:26 4 this isn't a sham litigation. That is -- that is dependent
10:20:29 5 on them.

10:20:30 6 And there are no plausible facts claimed in this
10:20:34 7 complaint. That is my -- what I'm going to walk through
10:20:38 8 here is the facts are all just the kind of conclusions that
10:20:41 9 you would see in a complaint by anybody who was ever saying
10:20:47 10 that a patent claim should not be brought.

10:20:50 11 And, in fact -- and -- and that's why I cited in
10:20:53 12 the -- in the slides that we have over and over again that
10:20:55 13 they're -- the basis of this complaint isn't something
10:20:58 14 else. It's just that they think that this is a sham.

10:21:01 15 And in our Slide 8, we've highlighted the text
10:21:05 16 showing that -- and in Slides 9, this is all just -- they
10:21:08 17 say we're doing this in bad faith, and that's the whole
10:21:12 18 point of this claim set.

10:21:13 19 So on our Slide 10, we pointed out that there are
10:21:20 20 two bases that they're using for this. One is the first
10:21:24 21 lawsuit between Luminati and -- and Tesonet. And the
10:21:25 22 second is this lawsuit. And -- and those -- that's it.
10:21:29 23 That's how they're -- that's how they're alleging that --
10:21:33 24 that they have a right for antitrust claims in this case.
10:21:37 25 Well, as we put out in Slide 11, there's no basis

10:21:42 1 for them to claim that the first lawsuit was a sham. And
10:21:49 2 Your Honor may recall, you know, in this case -- we were at
10:21:52 3 the pre-trial conference in this case with Your Honor, and
10:21:57 4 in that case, there were -- it was a patent claim, and it
10:21:59 5 was based on three parts of the system.

10:22:01 6 There was the originator who was requesting
10:22:05 7 information. There were these tunnel devices that were
10:22:09 8 intermediaries carrying out -- collect the technology.
10:22:12 9 They were -- they were making -- they were acting as sort
10:22:15 10 of agents for the originator, and then there is the
10:22:19 11 website that is being sought where the information is
10:22:21 12 coming from.

10:22:22 13 The defense here was not really that they didn't
10:22:24 14 do the things in the claim set. The defenses that were
10:22:28 15 forwarded in this case were purely jurisdictional and --
10:22:33 16 and based on late information that was provided in the case
10:22:35 17 where answers that were provided under oath were changed
10:22:39 18 very late in the case.

10:22:40 19 And, in fact -- at first they said one thing, and
10:22:44 20 then they said something entirely different very late in
10:22:49 21 the case. And there were -- that -- that was the basis
10:22:51 22 of -- and there was a second set of claims that were about
10:22:54 23 those nodes in the U.S., those tunnel devices, and that one
10:22:57 24 was held indefinite, but Luminati had a good faith basis
10:23:01 25 for why it disagreed with that.

10:23:03 1 And, in fact, has a -- has an appeal pending right
10:23:07 2 now. There's a notice of appeal they filed on August 20th
10:23:11 3 of -- earlier this year, and it's ECF No. 239-1 in the
10:23:17 4 Luminati versus Tesonet case.

10:23:19 5 So it can't be said that this was a bad -- that
10:23:22 6 that was a bad faith litigation. It just wasn't. And, in
10:23:25 7 fact, there wasn't even -- as far as we're concerned, there
10:23:28 8 wasn't even a technical defense to that case. It was all
10:23:30 9 about -- for the most part, it was about this
10:23:33 10 jurisdictional issue that arose late in the case.

10:23:35 11 So they would have to show that -- that that whole
10:23:38 12 case that I just talked about, that we never thought we had
10:23:41 13 a case. That -- that's the basis, that that was
10:23:45 14 objectively baseless, and that we knew it, okay. That's --
10:23:48 15 that's the first case. That's what it's talking about on
10:23:50 16 Slide 11.

10:23:51 17 And then on Slide 12, the second one is the
10:23:53 18 current case. And we -- we have no idea why they would say
10:23:58 19 that the current case is a sham brought in bad faith. We
10:24:01 20 are litigating this actively in the case. We -- we have no
10:24:05 21 indication that -- that there's any issues.

10:24:08 22 And, in fact, the issue that was raised in the
10:24:10 23 last case about this jurisdictional issue isn't even an
10:24:14 24 issue in this case because the last case was about the
10:24:17 25 originator. And this case is about these tunnel devices

10:24:22 1 that everybody admits exists in the United States.

10:24:26 2 So we do not have the issues in the last case at

10:24:30 3 all here, and we're pursuing it in good faith. So -- and

10:24:33 4 there's no real claim. They can't -- they haven't done

10:24:36 5 anything to prove -- for example, they didn't move to

10:24:38 6 dismiss this case. They haven't moved for early summary

10:24:41 7 judgment in this case in their paper. They've done nothing

10:24:44 8 that would allow the Court to have any indication that

10:24:47 9 there's a sham.

10:24:49 10 Okay. So -- so --

10:24:53 11 THE COURT: Well, let's -- let's do this.

10:24:55 12 MR. HARKINS: Yes.

10:24:55 13 THE COURT: Let's try to move on, mindful of our

10:24:59 14 time limitations.

10:25:01 15 Talk to me about your motion with regard to

10:25:03 16 monopolization and attempted monopolization.

10:25:06 17 MR. HARKINS: Okay. So what I will say is we both

10:25:10 18 agree that those claims are governed -- and basically

10:25:14 19 what's going on is they're saying we're attempting to

10:25:17 20 monopolize by asserting our patents. That -- that is the

10:25:21 21 basis of the claim -- that's what I already showed you.

10:25:28 22 And (audio drops) Investors versus Columbia Pictures. We

10:25:31 23 call it the PRE case, the Supreme Court case, 508 U.S. 49.

10:25:37 24 That is the Supreme Court case both sides agree govern the

10:25:42 25 Court's determination over whether that monopolization can

10:25:47 1 proceed. And it requires two -- two things to happen to
10:25:50 2 prove the sham litigation, and both sides will cite this,
10:25:54 3 too.

10:25:55 4 And so I actually want to go to -- sorry, Slide 15
10:25:58 5 here. The first thing is that they -- they have determined
10:26:03 6 this relevant market as residential proxies. And that's a
10:26:07 7 cite to their complaint at Paragraph 151. And that is --
10:26:13 8 that is basically the -- what the patents in this case
10:26:16 9 cover.

10:26:16 10 So they're basically just claiming that the market
10:26:19 11 for this monopoly is the patent -- the technology. That is
10:26:22 12 what's going on here.

10:26:23 13 So there's no other market. There's nothing else
10:26:26 14 outside of this they're talking about for monopoly. And
10:26:29 15 then when you go to our Slide 16, you'll see that they have
10:26:32 16 to do two things to overcome this Noerr-Pennington
10:26:37 17 Doctrine.

10:26:37 18 First is it has to be proved -- and first and
10:26:41 19 foremost, it has to be proved objectively baseless. And
10:26:44 20 that is that no reasonable litigant could realistically
10:26:50 21 expect success on the merits. It is irrelevant what
10:26:53 22 Luminati thinks or doesn't think. They would have to show
10:26:56 23 this Court that nobody with -- in their right mind would
10:27:00 24 have brought this case.

10:27:02 25 And I've discussed already why that couldn't be

10:27:04 1 the case with the first litigation which the parties
10:27:08 2 settled, and it's not the case in this litigation which
10:27:11 3 they haven't taken any measures to try to get dismissed.
10:27:12 4 So if you find that they did not plead facts, not
10:27:16 5 just the allegation of objective baselessness but facts
10:27:20 6 that you show -- that you could find that the case was
10:27:23 7 objectively baseless, if they didn't plead those facts, all
10:27:27 8 four of the monopoly claims get dismissed at that point.
10:27:30 9 Only if you find that no reasonable party could
10:27:33 10 have brought the claims that Luminati brought to move the
10:27:37 11 Court to, which is, well, maybe no reasonable party could
10:27:40 12 have thought it but did Luminati think it anyway. And if
10:27:42 13 you find first that nobody in their right mind would have
10:27:45 14 brought these claims, but, two, Luminati must not be in its
10:27:49 15 right mind because it brought these claims, and there's no
10:27:55 16 evidence that it did it -- yeah.

10:27:58 17 THE COURT: Mr. Harkins, I'm going to stop you for
10:27:58 18 a second. We're getting some annoying and interrupting
10:28:03 19 feedback audio-wise on this end. I don't know if somebody
10:28:04 20 does not have their device on mute and there's some
10:28:08 21 extraneous noise coming through from somewhere other than
10:28:12 22 Mr. Harkins, but everybody please check your devices. Make
10:28:15 23 sure there's not anything going on. This would apply to
10:28:18 24 those attending by telephone, as well.

10:28:20 25 It almost sounds like from this end there's a

10:28:32 1 quartz clock next to somebody's microphone, and I'm hearing
10:28:38 2 each tick of the second hand as it goes by.

10:28:38 3 MR. HARKINS: I think several of us are hearing
10:28:42 4 that, Your Honor, and I -- I've muted my mic a couple of
10:28:46 5 times to make sure it wasn't me. So I --

10:28:47 6 THE COURT: Well, it's -- it's annoying, but it
10:28:49 7 doesn't prevent me from hearing your argument. So -- well,
10:28:53 8 it stopped for whatever reason. Good.

10:28:55 9 While we're stopped, then let me ask you a
10:29:00 10 question, Mr. Harkins.

10:29:01 11 I'd like to hear your best arguments on the
10:29:05 12 combination and conspiracy theories with regard to the
10:29:11 13 antitrust matters. This would be Count 3, the combination
10:29:17 14 and conspiracy claim; and Count 4, the conspiracy to
10:29:25 15 monopolize claim.

10:29:28 16 Particularly, I'd like to hear your
10:29:29 17 characterizations with regard to EMK. And I'm going to
10:29:34 18 call it Hola. Those of us that live near people who speak
10:29:40 19 Spanish don't pronounce the "H," so I'm going to call it
10:29:44 20 that, even though it starts with an "H."

10:29:46 21 Let me hear your -- let me hear your arguments in
10:29:48 22 that regard, please, sir.

10:29:49 23 MR. HARKINS: Okay. Thank you.

10:29:50 24 So the combination of conspiracy discussion in our
10:29:56 25 slide set starts at Slide 34. And this is -- again, these

10:30:03 1 are all patent enforcement activities that are happening.
10:30:08 2 And what we cite here is Federal Circuit Fernandez-Montes
10:30:13 3 case: Conclusory allegations or legal conclusions
10:30:14 4 masquerading as factual conclusions will not suffice to
10:30:20 5 prevent a motion to dismiss.

10:30:21 6 And if you look at Slide 35 and 36, you can see
10:30:24 7 this is nothing but a barebones recitation of -- of the
10:30:29 8 type that is conclusory, that -- that Courts will not
10:30:32 9 accept. And that some of the facts talk about this idea
10:30:36 10 that there's EMK and Hola are -- are made. So let me
10:30:43 11 address that, please.

10:30:44 12 If you go to Slide 37, as you -- as you see, there
10:30:48 13 are three allegations for a conspiracy claim -- three
10:30:52 14 elements. In the Ancar case, the Fifth Circuit cites this
10:30:58 15 and there's a U.S. Supreme Court case, as well. And so you
10:31:02 16 need to show the existence of the conspiracy. Then you
10:31:05 17 need to show whether it affected interstate commerce and
10:31:08 18 whether you have to show that that includes unreasonable
10:31:08 19 restraint on trade.

10:31:09 20 So you have to show an agreement to commit an
10:31:13 21 offense, all right? So that's the Ingram case at Page 60,
10:31:20 22 U.S. 72 -- 672, excuse me --

10:31:23 23 THE COURT: What --

10:31:24 24 MR. HARKINS: Here in the complaint, these
10:31:26 25 conclusory allegations don't even do that. They don't --

10:31:28 1 I'm sorry, Your Honor, please.

10:31:30 2 THE COURT: What -- what I'm more specifically
10:31:32 3 interested in your -- are your arguments about EMK and
10:31:36 4 Hola, and are they or are they not separate decision
10:31:39 5 makers, their relationship to each other --

10:31:47 6 MR. HARKINS: Yeah, okay.

10:31:48 7 THE COURT: -- and the parent --

10:31:48 8 MR. HARKINS: Yes, yes.

10:31:50 9 THE COURT: In other words, that's -- that's the
10:31:51 10 kind of things I'd like you to focus on.

10:31:53 11 MR. HARKINS: Okay. So there are two things
10:31:55 12 happening here. And one is on that slide I was about to
10:31:58 13 address, which is the one about Hola.

10:31:59 14 So Hola VPN is a -- is a -- its own -- has been
10:32:03 15 its own company. And it is a free virtual private network
10:32:07 16 service. We don't -- there's no facts -- it's a separate
10:32:13 17 company, but there's no facts that show there's any
10:32:15 18 agreement between Hola and Luminati to conspire to do
10:32:18 19 anything. Hola operates as a free VPN service. It is a --
10:32:24 20 it is a licensed entity that's -- that is just operating on
10:32:28 21 its own. And there's no facts in the complaint that show
10:32:31 22 that Hola did anything to monopolize anything.

10:32:35 23 Like there's no -- what did Hola -- what is the
10:32:38 24 agreement that Hola made with Luminati? So to the extent
10:32:40 25 that there's an allegation that Hola is a separate entity,

10:32:43 1 it has been a separate entity.

10:32:45 2 What happened is there was one company, and they
10:32:49 3 spun off. And -- and Hola is -- became one of the
10:32:52 4 entities, and Luminati became the other. And there's a
10:32:55 5 license -- there is a license agreement between them.

10:32:59 6 But there's no -- there's no allegations in the
10:33:01 7 complaint about Hola that would allow the Court to allow
10:33:05 8 that claim to continue, even if it found Noerr-Pennington
10:33:09 9 not to -- not to knock it out. So that's -- that's in
10:33:14 10 Hola. Okay. Please.

10:33:16 11 THE COURT: Well, before we -- before we leave
10:33:18 12 Hola --

10:33:19 13 MR. HARKINS: Yeah.

10:33:20 14 THE COURT: -- am I correct it was founded by the
10:33:23 15 two gentlemen who founded Luminati? Its registered address
10:33:27 16 is at the same address? These are the same two people that
10:33:31 17 are the inventors of the patents-in-suit?

10:33:35 18 Tell me what is there that would support a
10:33:37 19 conclusion that they're not effectively one and the same.

10:33:43 20 MR. HARKINS: Well, I -- I -- I think that they
10:33:44 21 are under common -- they are under a certain amount of
10:33:48 22 common control because of, you know, all the things you've
10:33:51 23 said. And I don't have any facts that would not indicate
10:33:53 24 that they're for the purpose of the monopoly claim one and
10:33:56 25 the same.

10:33:57 1 THE COURT: Okay.

10:33:57 2 MR. HARKINS: They are in the same building. They
10:33:59 3 do have common ownership. It's not -- the difference is --
10:34:03 4 all I'll say is just to be -- full disclosure because I
10:34:06 5 don't want to say anything wrong on the record. I don't
10:34:09 6 believe EMK has any ownership at all -- that EMK owns Hola
10:34:13 7 or like it has owned Hola. So that's -- that's where this
10:34:17 8 split came from.

10:34:18 9 But, otherwise, as far as is there any basis to
10:34:21 10 say that they -- they are separate entities for the purpose
10:34:25 11 of a monopoly, I think all the facts that Your Honor has
10:34:28 12 stated are correct as far as the single enterprise law that
10:34:34 13 has been applied by cases like the Copperweld U.S. Supreme
10:34:40 14 Court case, 467 U.S. 752. I think you could apply that.

10:34:43 15 So --

10:34:43 16 THE COURT: Talk to me then about EMK.

10:34:45 17 MR. HARKINS: Okay. So EMK is definitely not a
10:34:51 18 separate entity for purposes of monopoly claims. And at
10:34:56 19 Slide 39, we talk about the allegation that has been made
10:34:59 20 that -- that -- about EMK having a controlling interest,
10:35:04 21 and that is correct. EMK owns most of Luminati. They have
10:35:08 22 the -- they have the -- it is -- it is actually alleged in
10:35:12 23 the complaint that they have -- they own most of Luminati.
10:35:15 24 As soon as that allegation in Paragraph 132 of
10:35:20 25 the -- of the amended counterclaims was made, as far as I

10:35:22 1 know, that kills the ability to claim a conspiracy between
10:35:28 2 EMK and Luminati for sure. And that's also supported by
10:35:30 3 that Copperweld case.

10:35:31 4 THE COURT: All right. Let's move on and talk
10:35:33 5 about the breach of contract claims.

10:35:34 6 MR. HARKINS: Okay. Thank you, Your Honor.

10:35:35 7 So we start talking about them at Slide 40 where
10:35:39 8 we put out the elements of the breach of contract claims,
10:35:44 9 but I think fact -- Your Honor knows the law very well.

10:35:47 10 I'm going to go to Slide 42 where we set out what
10:35:51 11 the two -- two bases of this counterclaim are.

10:35:54 12 There are the two -- the two things that are
10:35:57 13 alleged to support the breach of contract -- and I will say
10:35:59 14 this is one area Noerr-Pennington doesn't -- doesn't apply
10:36:03 15 to. This is the only one of our claims that we would cite
10:36:06 16 Noerr-Pennington is not an issue for. But it just does not
10:36:10 17 meet the requirements to plead breach of contract under
10:36:12 18 12(b) (6).

10:36:14 19 So the first of the agreements is this 408
10:36:17 20 agreement, and the second is this sort of vague allegation
10:36:20 21 to Defendants' own general conditions, all right? And I'd
10:36:24 22 like to take those in turn.

10:36:26 23 On Slide 42, as we note -- so this 408 agreement,
10:36:28 24 as alleged, and there's no allegations to the contrary in
10:36:31 25 the -- in the counterclaims that -- the facts are that --

10:36:35 1 that Teso -- representatives of Teso approached Luminati
10:36:42 2 and asked to have a settlement discussion to see if the --
10:36:45 3 if the parties could resolve the case.

10:36:47 4 The response to that by Luminati was at that time,
10:36:50 5 we're willing to have this meeting with you, but whatever
10:36:53 6 happens at that meeting needs to be covered by 408 in
10:36:57 7 confidentiality. We don't want whatever contents happen at
10:37:00 8 that meeting to be disclosed, okay?

10:37:03 9 That's what the agreement says. The agreement --
10:37:07 10 Your Honor sees the agreement. The actual agreement
10:37:09 11 itself, that's -- it says we're going to have this meeting,
10:37:12 12 and at the meeting, we're going to talk, and we don't want
10:37:15 13 to disclose what happens at the meeting.

10:37:18 14 There are no allegations con -- contrary to the
10:37:20 15 fact that that meeting never even happened. There was no
10:37:22 16 meeting. The -- the courts didn't end up getting together.
10:37:26 17 There was no back and forth. There was no substance
10:37:30 18 because they never met. So this is a hollow agreement
10:37:33 19 about something that never happened.

10:37:34 20 Now, the -- the basis of the complaint appears to
10:37:38 21 be a statement that was made that -- that -- that Teso
10:37:41 22 approached Luminati about -- about settlement. That
10:37:45 23 preceded any -- that -- that's what led to negotiations
10:37:49 24 that led to the agreement, but it has nothing to do with
10:37:52 25 what happened or what is covered by the agreement. There's

10:37:54 1 also no allegations that any confidential information was
10:37:58 2 exchanged or disclosed.

10:38:00 3 So we don't understand how an allegation about
10:38:03 4 something that precedes -- that leads to a negotiation,
10:38:06 5 that leads to an agreement could lead -- and when that --
10:38:10 6 when nothing ever happened and nothing was ever disclosed
10:38:14 7 could ever be the basis for a claim for breach of contract.
10:38:18 8 I mean, it wasn't -- you have to do something to breach the
10:38:21 9 contract. Did the contract cover the meeting? That didn't
10:38:21 10 happen.

10:38:23 11 And there's no allegation to the contrary. It
10:38:25 12 just appears to be that they're trying to say that this
10:38:28 13 subsequent agreement relates back to the fact that they
10:38:31 14 approached us in the first place. There -- there's no
10:38:33 15 provision in that agreement that says that.

10:38:36 16 And I think if -- if Your Honor looks at the
10:38:38 17 agreement, you'll see there is no provision that says that,
10:38:41 18 and so there cannot be a basis for that claim. That's --
10:38:44 19 that's the first one.

10:38:45 20 If Your Honor doesn't have any questions, I'll
10:38:47 21 move to the second basis of their claims.

10:38:49 22 THE COURT: Please do.

10:38:50 23 MR. HARKINS: That is Slide 43.

10:38:52 24 So they say that we violated their general
10:38:55 25 conditions agreement, and the -- the -- I mean, the -- we

10:38:59 1 don't understand what it is that -- that is the basis of
10:39:02 2 this, but they cannot use that agreement as the basis to
10:39:06 3 bring a suit here because, as we show on Slide 43, the
10:39:10 4 general conditions agreement very clearly establishes a
10:39:15 5 choice of form and a choice of law clause that make --
10:39:18 6 requires any disputes under that agreement to be resolved
10:39:21 7 in Lithuania.

10:39:22 8 So that -- that just simply can't be a basis to
10:39:27 9 bring a claim for breach of contract in Texas. And so
10:39:31 10 there's no -- there's no basis for this Court to be getting
10:39:34 11 involved in an alleged breach of a general conditions
10:39:38 12 agreement that is in Lithuania and says it needs to be
10:39:41 13 resolved in Lithuania.

10:39:43 14 So that -- that's what I -- if you have questions
10:39:47 15 about breach of contract, I can answer them, or we -- we
10:39:50 16 can move to the next subject.

10:39:51 17 THE COURT: Let's talk about the inequitable
10:39:53 18 conduct claims.

10:39:53 19 MR. HARKINS: Okay. So starting at Slide 44,
10:39:59 20 it's -- it's framed as unenforceability. But, yes, it's
10:40:04 21 based on inequitable conduct. I think there's agreement
10:40:07 22 that needs to be pled with specificity. It needs to have
10:40:10 23 plausible facts showing essentially some kind of fraud on
10:40:13 24 the Patent Office. They're in violation of the -- of the
10:40:17 25 duty of candor. And -- and there is only one basis for

10:40:22 1 this.

10:40:22 2 And it -- it can get a little complicated, and I
10:40:27 3 may -- it may be that it's better to hear from the other
10:40:29 4 side, and I can respond to some of this.

10:40:32 5 But basically what it is, is there is a -- they're
10:40:38 6 saying that basically in the '614 patent, there should have
10:40:43 7 been another disclosure, that there should have been a
10:40:47 8 disclosure of the -- the '319 patent.

10:40:53 9 And on Slide 44, that's what it says. But -- but
10:40:57 10 what happened is the '349 patent extends from the '604
10:41:06 11 patent, and we all agree that the '604 patent was
10:41:10 12 disclosed.

10:41:11 13 And so actually I think the easiest thing to do
10:41:14 14 here is -- I actually want to show you this. So why don't
10:41:18 15 we go ahead and -- it's Slide 47 that we talk about this
10:41:22 16 issue. It's -- the '319 was a continuation of the '604.
10:41:27 17 So when they say it was withheld, it has the same exact
10:41:31 18 specification. It's the actual disclosure was disclosed.

10:41:33 19 Look at Slide 48. You can see that on the face of
10:41:38 20 the '614 patent -- it's actually on Page 2 -- it cites it
10:41:42 21 right there in black and white that we disclosed -- and
10:41:44 22 it's another patent that the same inventors invented. So
10:41:47 23 they knew about it, and they disclosed it. And -- and it's
10:41:50 24 listed right there.

10:41:51 25 So if you look, that's the '604 patent on Slide

10:41:56 1 48. If you look at Slide 49, you can see that -- that the
10:41:59 2 '319 patent that they're telling -- they're talking about
10:42:03 3 as being the thing we didn't disclose says right on it --
10:42:06 4 it's a continuation of a division of the '604 patent.

10:42:10 5 Well, a continuation of a division means that
10:42:12 6 you're not allowed to add new matter. There's no
10:42:16 7 disagreement about that, that -- you can't have additional
10:42:19 8 disclosure for this patent over that '604 patent. The
10:42:25 9 disclosure has to be the same. And if it -- if we -- if
10:42:26 10 you try to add new matter, that can only be done by a
10:42:30 11 continuation-in-part. So you cannot -- you can't do it,
10:42:32 12 okay.

10:42:32 13 So -- so there's no obligation to keep disclosing
10:42:36 14 the same specification over and over again to the Patent
10:42:39 15 Office once the -- once the patent was disclosed, you've
10:42:44 16 disclosed it. And -- so -- so that's basically the -- the
10:42:47 17 gist here.

10:42:48 18 What's going on with this is -- and I think
10:42:54 19 they're going to talk about this needle in a haystack idea,
10:42:59 20 I think, and how they think that what matters in the patent
10:43:02 21 are the claims that were in the '319 patent.

10:43:05 22 So I'm just going to -- I'm going to say this now,
10:43:08 23 and I think it -- once you see the other side's
10:43:10 24 presentation, I'll be glad to address it in more detail.
10:43:13 25 But the '319 -- first of all, claims of a patent

10:43:19 1 are not the disclosure of the patent. The patent
10:43:23 2 specification discloses what's -- whether something is
10:43:25 3 prior art or not. You cannot base invalidity of prior art
10:43:30 4 on claims that are in a subsequent application because
10:43:34 5 those claims cannot add matter. Ever -- all the matter has
10:43:38 6 to be in the original application of the patent.

10:43:40 7 So saying that claims in a later patent
10:43:44 8 application could possibly be relevant or you need to
10:43:47 9 disclose that separately, that -- that's just wrong. That
10:43:50 10 can't possibly be correct.

10:43:52 11 That, in fact, could be -- you know, they talk
10:43:54 12 about creating this haystack of prior art. Well, I tell
10:43:58 13 you what would definitely create a haystack of prior art,
10:44:02 14 if you had to disclose the same specification over and over
10:44:05 15 and over again every time you had a continuation or a
10:44:08 16 divisional, the -- the disclosures in these patents would
10:44:11 17 create a flurry of -- of patents that look like they're
10:44:14 18 different, but they're really the same. And then when you
10:44:16 19 have other art that you disclose, people would say, oh, you
10:44:19 20 buried that in a mountain of art that -- where you just
10:44:22 21 kept telling the Patent Office the same thing over and over
10:44:24 22 again.

10:44:24 23 That's not reasonable as a patentee. You know,
10:44:27 24 that's inequitable conduct. So that is cumulative. It's
10:44:30 25 purely cumulative of -- of that, and there's no dispute

10:44:32 1 that that -- that that entire specification was disclosed
10:44:35 2 and cited in the patent.

10:44:37 3 As far as the claims go, I -- I just want you to
10:44:41 4 know that what they're -- what the allegations are here is
10:44:44 5 that the claims of the '319 patent are related to add --
10:44:51 6 some additional matter that was added to a dependent claim,
10:44:54 7 but there's no allegation of double patenting here.
10:44:58 8 There's no allegation that Luminati tried to sneak through
10:45:02 9 a double patenting situation in the Patent Office.

10:45:04 10 We all agree that the claim that got through the
10:45:06 11 Patent Office on the '614 patent is long and has a lot of
10:45:11 12 elements, and it -- it has many more elements than were
10:45:14 13 ever discussed in that '319 disclosure.

10:45:18 14 I'll leave it there because I think --

10:45:18 15 THE COURT: All right.

10:45:18 16 MR. HARKINS: -- Your Honor doesn't have a
10:45:20 17 basis -- you know, you need to see what they're going to
10:45:23 18 say about it, I think, for you to understand why that's
10:45:25 19 relevant. So that's pretty much -- we cited law about
10:45:29 20 unenforceability.

10:45:29 21 And the only other thing I'll say is everything
10:45:33 22 I've told you, even if you were to disagree with it, it was
10:45:37 23 reasonable for the patentee to understand it that way. And
10:45:39 24 the law that we cite on Slides 51 through -- through -- I'm
10:45:43 25 sorry, 51 through 54 all indicate that, you know, even if

10:45:49 1 you disagreed with us about it, as long as it was possibly
10:45:54 2 reasonable that we thought that, that that's also a reason
10:45:57 3 it's not inequitable conduct.

10:45:59 4 THE COURT: All right. Mr. Harkins, thank you.

10:46:01 5 Is there anything else on this motion to dismiss,
10:46:03 6 Document 102, that you feel is important that we haven't
10:46:08 7 covered you want to touch on briefly before I hear from the
10:46:12 8 other side?

10:46:13 9 MR. HARKINS: No, I think that covers it, Your
10:46:16 10 Honor. I mean, I -- I'll reserve any, you know, response
10:46:18 11 based on what I hear from the other side.

10:46:21 12 THE COURT: Well, given the ground we've got to
10:46:22 13 cover, I don't know how much time we'll have for a response
10:46:25 14 and response again and response after that.

10:46:27 15 So let's move on and let me hear from Teso in
10:46:32 16 response on this motion.

10:46:33 17 MR. CALLAHAN: Chief Judge Gilstrap, good morning.
10:46:37 18 And may it please the Court. Steven Callahan. I will
10:46:40 19 address the majority of the motion to dismiss the antitrust
10:46:47 20 claims, the breach of contract claim, and then my
10:46:51 21 colleague, Mr. Scott, will handle the inequitable conduct
10:46:54 22 claim.

10:46:54 23 First --

10:46:54 24 MR. HARKINS: I apologize -- I apologize,
10:46:56 25 Mr. Callahan. I just -- are you going to be using

10:46:59 1 materials that were marked "restricted attorneys' eyes
10:47:03 2 only" in your presentation?

10:47:03 3 MR. CALLAHAN: So what I've done -- I will not
10:47:05 4 because we're not under seal. I will just point to the
10:47:08 5 parts of the slide, and I can just direct the Court to it
10:47:14 6 without referencing it.

10:47:16 7 Alternatively, I guess if the Court would like to
10:47:18 8 go into the sealed session, we could do it that way. But
10:47:22 9 I -- I sent this, Your Honor, to -- my slide deck to the
10:47:26 10 opposing counsel, and I told them the portions in red are
10:47:28 11 the portions that I think disclose their designated
10:47:32 12 information. So I will -- I will not reference those
10:47:35 13 orally.

10:47:35 14 THE COURT: All right. Let's -- let's go forward.
10:47:37 15 If there's a need to get beyond what's publicly disclosed,
10:47:43 16 we can talk about sealing then. But, otherwise, I'm happy
10:47:46 17 for you just to reference the language in red on the slides
10:47:51 18 that I can see without talking about it precisely in the
10:47:54 19 record.

10:47:55 20 MR. CALLAHAN: Yes, sir. So Steven Callahan here.
10:47:59 21 I would like to start by addressing the suggestion
10:48:02 22 that if this motion to dismiss is not granted, then you
10:48:07 23 will see antitrust claims asserted in every patent
10:48:11 24 infringement case.

10:48:12 25 With respect, we disagree. We think this case is

10:48:15 1 relatively unique. And there are two critical things here
10:48:19 2 that we think puts it -- put -- puts this case in a unique
10:48:25 3 bucket.

10:48:25 4 Number one, it's the facts that we have pled in
10:48:28 5 our complaint, and these include a substantial number of
10:48:31 6 facts that were unearthed from the earlier Tesonet case.
10:48:35 7 And we set those out in great detail, and we quote from
10:48:39 8 them in our complaint or our counter -- counter-complaint.

10:48:44 9 And then the second fact is you can't allege an
10:48:48 10 antitrust violation if you simply think the other side has
10:48:52 11 brought a sham patent case. You have to do more than that.
10:48:55 12 You actually have to establish the monopolization and the
10:48:58 13 antitrust elements.

10:49:00 14 And so in the vast majority of cases where
10:49:04 15 somebody thinks, oh, this claim is frivolous, they're not
10:49:07 16 going to be able to assert an antitrust claim because the
10:49:11 17 other side did not have monopoly power.

10:49:14 18 So those are two reasons why we think this case
10:49:16 19 is -- is certainly distinguishable.

10:49:18 20 So, Your Honor, looking at our slide deck, which
10:49:21 21 we submitted to you, the first several pages are just
10:49:23 22 background about the elements.

10:49:24 23 I'll go to Slide 6, Your Honor, to talk about some
10:49:27 24 of the facts that we plead that make this case quite
10:49:31 25 unique, in our opinion.

10:49:32 1 The first is that Luminati's majority owner, prior
10:49:38 2 to the first lawsuit, reached out and attempted to acquire
10:49:41 3 us. Mr. Harkins called us Teso or Tesonet. We'll call
10:49:45 4 ourselves Oxylabs, but they're -- they're all the same for
10:49:49 5 purposes of this motion.

10:49:49 6 They attempted to acquire us. That acquisition
10:49:54 7 attempt went nowhere. And then Luminati filed the first
10:49:57 8 lawsuit that we plead, supported by facts, was a meritless
10:50:02 9 patent infringement lawsuit. That lawsuit obviously was
10:50:07 10 resolved by a settlement, as Mr. Harkins noted and which we
10:50:11 11 also note. And then what happened -- well, actually right
10:50:15 12 before the settlement, maybe a month before, we've been
10:50:18 13 sued another time. So that's a second one. That's the
10:50:21 14 case we're in here. And then we were sued in a third case,
10:50:24 15 as well.

10:50:24 16 So in these three lawsuits, Luminati -- Luminati
10:50:27 17 asserts seven patents. We plead that Luminati has declared
10:50:35 18 a self-described, quote, unquote, war on Oxylabs. And that
10:50:40 19 war is designed to weaken us so that we would either be
10:50:41 20 acquired at a favorable price or to force us out of
10:50:44 21 business.

10:50:44 22 On Slide 6, I would direct Your Honor to Paragraph
10:50:48 23 4 -- 142 of our counterclaims. And we cite Luminati's
10:50:55 24 internal documents.

10:50:56 25 We also have additional facts that relate to our

10:51:01 1 monopolization and attempted monopolization claim that also
10:51:03 2 come from the internal documents, and those are on the last
10:51:06 3 two bullet points of Slide 6.

10:51:08 4 Additional facts that we believe plausibly suggest
10:51:15 5 that what's going on here is sham patent litigation is
10:51:21 6 these cases -- now three cases filed against us. You look
10:51:24 7 to the damages prayer, or what would potentially be the
10:51:28 8 damages prayer. We know the prayer from the first case.
10:51:31 9 These are tiny cases, especially compared to the cases that
10:51:36 10 Your Honor sees before him regularly.

10:51:38 11 In the first case, the damages prayer did not
10:51:41 12 exceed the cost of defense. We plead that that would be
10:51:43 13 the case in this case and the next case, as well. And we
10:51:47 14 plead that the reason why we're here is to force us to
10:51:53 15 spend millions of dollars and numerous years essentially
10:51:58 16 litigating.

10:51:59 17 In the Tesonet case, we think this is quite
10:52:01 18 important. Luminati moved to vacate and extend its own
10:52:03 19 trial setting. That, to us, at least suggests that they
10:52:06 20 didn't care about the merits of the case, or at least
10:52:09 21 didn't care that much.

10:52:10 22 We -- we talk about the settlement, and we plead
10:52:13 23 that they made some arguments that suggests that they were
10:52:17 24 just trying to keep their case alive.

10:52:19 25 Your Honor, we talk about non-patent claims.

10:52:20 1 These are claims that were asserted against us in the
10:52:25 2 Tesonet case, four causes of action. We went through the
10:52:28 3 case. We conducted discovery on them. We plead in our
10:52:31 4 counterclaims that the claims were meritless, that
10:52:35 5 discovery showed them to be meritless.

10:52:38 6 Luminati dismissed those claims without prejudice.
10:52:41 7 No doubt, it was without prejudice. But, again, they
10:52:43 8 brought them back in this case.

10:52:46 9 So we're now having to deal with these claims that
10:52:49 10 one could plausibly believe if they were important enough,
10:52:53 11 they wouldn't have been dismissed without prejudice.

10:52:57 12 We also claim that we've been sued on a patent
10:53:01 13 obtained by inequitable conduct. That's the '614 patent.

10:53:05 14 Further, we talk about -- now I'm on Slide 8 -- we
10:53:09 15 talk about what Luminati has done in the marketplace and
10:53:12 16 their threats to our customers, our potential customers,
10:53:14 17 and our business partners. They tell -- they tell
10:53:16 18 people -- they tell them: You must stop doing business
10:53:19 19 with -- with Oxylabs. You must remove their SDK. They
10:53:23 20 tell them that our products are illegal to use. They've
10:53:28 21 made communications about what the prior lawsuit settlement
10:53:32 22 allegedly means and what Luminati is -- is the only party
10:53:36 23 who can use servers or residential proxy (beeping) in the
10:53:40 24 United States.

10:53:42 25 We think that this is -- you know, all of these

10:53:44 1 facts together show what's really going on, and that's what
10:53:47 2 we plead.

10:53:48 3 And then with respect to whether Luminati knows
10:53:53 4 that its -- that its claims are sham, obviously, state of
10:53:57 5 mind on a Rule 8 motion -- you know, even 9(b), you can
10:54:01 6 allege it generally, but certainly here we're not on 9(b)
10:54:05 7 for the antitrust claims.

10:54:06 8 But we -- we -- we give objective facts. We plead
10:54:11 9 them that -- that we think overcomes the pleading standard
10:54:14 10 to suggest that they do have knowledge. And that would
10:54:18 11 include in the first lawsuit, one of the three independent
10:54:21 12 claims was declared invalid. And Oxylabs has repeatedly
10:54:25 13 placed Luminati on notice. We sent letters (beeping)
10:54:30 14 reports. We filed summary judgment motion. We filed Alice
10:54:34 15 motions, et cetera.

10:54:35 16 Nevertheless, we're still here. We're still
10:54:38 17 hearing about the patents in the marketplace and our
10:54:41 18 customers, et cetera.

10:54:41 19 We also plead that as part of their strategy, not
10:54:45 20 simply Oxylabs has been involved but other players in the
10:54:50 21 marketplace, including IP Ninja and BI Science, have been
10:54:55 22 sued, and both of those entities we plead on account of the
10:55:00 23 lawsuit have gone out of business. So we think that the --
10:55:03 24 the -- the strategy has been successful.

10:55:04 25 So in summary, on the sham patent litigation, we

10:55:08 1 think it's well pled that the claims are objectively
10:55:12 2 baseless, especially on a motion to dismiss, and they were
10:55:15 3 brought to interfere with our business.

10:55:17 4 Moving to the monopolization claims, we also have
10:55:20 5 to hit a few other elements. The first is monopoly power.
10:55:24 6 We plead that there's a highly concentrated market for
10:55:27 7 residential proxies in the United States, that Luminati has
10:55:29 8 the power to control price or exclude competition.

10:55:32 9 And we cite to a market report that shows that
10:55:35 10 Luminati has 53.1 percent of the market -- the proxy market
10:55:39 11 generally. We plead that they actually have more of the
10:55:42 12 residential U.S. proxy market.

10:55:44 13 So we're -- we're above 53 percent which the cases
10:55:47 14 say that more than 50 percent can generally establish a
10:55:50 15 monopoly.

10:55:50 16 I'll also note, Your Honor, that with BI Science
10:55:54 17 out of the market, that Frost & Sullivan report says that
10:55:58 18 BI Science has a 10.6 percent share. And as part of their
10:56:01 19 settlement, as -- as we understood, as publicly announced,
10:56:05 20 BI Science will be leaving the marketplace and -- and
10:56:09 21 transitioning folks over to Luminati.

10:56:10 22 So market share is even higher. We plead
10:56:10 23 substantial barriers to entering the market. We require
10:56:10 24 this critical mass of residential proxies that would take
10:56:20 25 millions of -- yes, sir, sorry.

10:56:24 1 THE COURT: Mr. Callahan, talk to me about the
10:56:29 2 conspiracy claims under Counts 3 and 4, please.

10:56:29 3 MR. CALLAHAN: Yes, sir. So with respect to the
10:56:31 4 conspiracy, we'll go to Slide 12.

10:56:32 5 We do plead that a conspiracy exists. I think
10:56:37 6 that the pleading is -- is quite clear with respect to EMK,
10:56:42 7 that EMK is a separate entity for purposes of the -- the
10:56:48 8 antitrust claims. Mr. Harkins did reference a -- a case
10:56:53 9 that I believe he suggested would show that it's a single
10:56:57 10 enterprise. And that case, as I recall, deals with a
10:57:01 11 parent and a subsidiary. And in that case, I believe it
10:57:05 12 was a hundred percent owned subsidiary.

10:57:07 13 Here, we're not talking about a hundred percent
10:57:10 14 owned subsidiary. There is a majority ownership. And so
10:57:14 15 if Your Honor found that the majority ownership was enough
10:57:17 16 to extinguish the claim, that claim would be extinguished.
10:57:21 17 But we're not aware of any case that would suggest that a
10:57:24 18 mere majority owner is sufficient to cause it to be one
10:57:29 19 enterprise.

10:57:29 20 So with respect to -- yes, sir.

10:57:32 21 THE COURT: How do you respond to the American
10:57:37 22 Needle/National Football League case which effectively
10:57:42 23 says -- or the Supreme Court effectively says the real
10:57:45 24 question is whether it joins together separate decision
10:57:50 25 makers? How -- how -- how can you convince me that EMK and

10:57:55 1 Hola are separate decision makers in this context?

10:57:58 2 MR. CALLAHAN: So we -- well, I'll say this, and I
10:58:04 3 do -- we do plead that -- that EMK controls Luminati. And,
10:58:09 4 again, I think that the -- the separate decision maker fact
10:58:12 5 is that EMK does -- you know, is a separate entity, it does
10:58:18 6 have majority ownership. You know, certainly, the
10:58:22 7 day-to-day business decisions have separate decision makers
10:58:24 8 between the entities.

10:58:26 9 Luminati is -- is not just a mere puppet company
10:58:31 10 or a shell company or anything like that. They -- they
10:58:33 11 have, as I understand, over a hundred employees, CEOs,
10:58:33 12 et cetera.

10:58:38 13 But there is -- there are overlapping decision
10:58:43 14 makers both between EMK and Hola, no doubt. And that's
10:58:45 15 part of the reason for the conspiracy that we allege.

10:58:47 16 And so, again, if Your Honor finds that these
10:58:50 17 entities are essentially one entity, then the conspiracy
10:58:56 18 claim no doubt would go away, admittedly.

10:58:58 19 But we -- we think -- and we haven't seen the law,
10:59:01 20 at least, that would suggest that some sort of related
10:59:05 21 companies, Hola and Luminati, are a single entity for
10:59:10 22 antitrust purposes. And also EMK, which is a more related
10:59:13 23 company, I'll say, based on its ownership interest, could
10:59:17 24 not be subject to the claims.

10:59:19 25 THE COURT: All right. Let's talk about -- let's

10:59:22 1 talk about the breach of contract claims, please.

10:59:25 2 MR. CALLAHAN: Yes, sir.

10:59:25 3 So we have two breach of contract claims. The

10:59:29 4 Rule 408 agreement, I'd like to address first. And I'm on

10:59:33 5 Slide 19, Your Honor.

10:59:34 6 That precludes -- so we entered into this Rule 408

10:59:39 7 agreement on February 25, 2020. Then -- this is important

10:59:44 8 because of the timing, and I'll -- I'll try to make this

10:59:46 9 clear because this is what we're -- we're pleading. We

10:59:50 10 entered into the Rule 408 agreement on February 25. Then

10:59:50 11 there were discussions between the parties about engaging

10:59:57 12 in settlement. Let's set up a meeting. Can we set up a

10:59:59 13 meeting? Can we try to get this case resolved?

11:00:02 14 That meeting indisputably did not happen. There

11:00:07 15 was no ultimate meeting. And as Mr. Harkins notes, and we

11:00:10 16 agree, there was no confidential information disclosed but

11:00:13 17 for the confidential settlement communications about

11:00:16 18 getting the meeting up and going.

11:00:18 19 But the agreement itself is -- is quite broad. It

11:00:22 20 precludes Luminati from publicly disclosing any

11:00:25 21 communications relating to settlement discussions. So it

11:00:29 22 doesn't have -- the communication doesn't have to happen at

11:00:32 23 a formal meeting. It's anything about settlement

11:00:34 24 discussions.

11:00:34 25 And Luminati violated that Rule 408 agreement,

11:00:38 1 according to our pleading, by publicly disclosing details
11:00:43 2 concerning the parties' settlement communications. They
11:00:46 3 told the world in a press release that we contacted them,
11:00:49 4 and we basically asked, begged, whatever, to settle. We
11:00:53 5 went to them saying: Please settle our case. And that, to
11:00:56 6 us, is a violation of the Rule 408 agreement.

11:00:59 7 Now, with respect to the general conditions, we
11:01:04 8 have general conditions that apply to all of our customers
11:01:09 9 and those using our service, and we claim that -- that
11:01:11 10 Luminati has -- has violated those general conditions. You
11:01:16 11 know, discovery, I've got -- I've got a red bullet point on
11:01:19 12 Slide 19 that talks about it.

11:01:20 13 But I want to talk about the -- the venue clause
11:01:24 14 that Mr. Harkins pointed to. That venue clause is clearly
11:01:30 15 permissive. It says that venue may be brought. Either
11:01:34 16 party may bring a case in Lithuania. And to us, that is a
11:01:38 17 permissive venue clause.

11:01:41 18 In our briefing, we cite authority that suggests
11:01:44 19 that you actually have to have an exclusive venue to be
11:01:48 20 kicked out. And then I'll also note, Your Honor, we're
11:01:50 21 here on a motion to dismiss for failure to state a claim
11:01:54 22 under Rule 8 on this contract claim. Luminati has not
11:01:57 23 filed a motion to dismiss for improper venue.

11:02:01 24 So that's what I would say about the -- the breach
11:02:06 25 of contract. And unless Your Honor has any questions, I

11:02:08 1 can turn it over to Mr. Scott to address inequitable
11:02:12 2 conduct.

11:02:12 3 THE COURT: That'd be appropriate. Let me hear
11:02:14 4 from Mr. Scott.

11:02:15 5 MR. CALLAHAN: Thank you, sir.

11:02:17 6 MR. SCOTT: Thank you, Mr. Callahan.

11:02:19 7 Good morning, Chief Judge Gilstrap. May it please
11:02:23 8 the Court. I'm -- I'm George Scott for the Defendants in
11:02:32 9 this case.

11:02:32 10 So if you turn to Slide 20, please.

11:02:34 11 As Mr. Callahan noted, this is a -- this is a
11:02:38 12 motion to dismiss. This isn't a motion for summary
11:02:40 13 judgment. This isn't trial right now. And the pleading
11:02:44 14 standard (audio skips) is significantly lower than some of
11:02:52 15 the cases that Luminati has cited in their briefing.

11:02:54 16 You know, the pleading standard here is that
11:02:58 17 Defendants need to simply recite facts from which the Court
11:03:02 18 may reasonably infer that a specific individual knew both
11:03:06 19 invalidating information was withheld from the PTO and that
11:03:12 20 information was withheld with a specific intent. And,
11:03:14 21 importantly, it just -- the Court just needs to be able to
11:03:17 22 draw an inference that the intent to deceive is plausible
11:03:20 23 and that it flows logically from the facts.

11:03:22 24 And certainly later on in the case, we are going
11:03:25 25 to be able to be required to show that that inference is

11:03:29 1 the sole inference or the most reasonable inference. But
11:03:34 2 at this point, it just has to be that it is an inference
11:03:37 3 that can be reasonably drawn from the pleadings.

11:03:42 4 THE COURT: Let me -- let me stop you, counsel.

11:03:44 5 What I heard from Mr. --

11:03:45 6 MR. SCOTT: Yes, Your Honor.

11:03:46 7 THE COURT: What I heard from Mr. Harkins was
11:03:48 8 effectively there's no duty to disclose, therefore, we
11:03:53 9 can't have acted -- you know, there can't be an inequitable
11:03:56 10 conduct.

11:03:56 11 Can you address the duty to disclose issue?

11:04:02 12 MR. SCOTT: Yes, Your Honor.

11:04:03 13 I think -- you know, Slide 23 is probably the most
11:04:08 14 on-point on this. You know, I think that Mr. Harkins and I
11:04:13 15 just have a fundamental disagreement as opposed to what the
11:04:17 16 duty to disclose related family patent applications is to
11:04:24 17 an examiner who isn't aware of those applications.

11:04:28 18 As -- as you can see -- actually, I think moving
11:04:31 19 back up to Slide 22 is probably better. This is a very
11:04:35 20 large family in the '319 patent here. That red line there
11:04:40 21 signifies the patent applications that were filed before
11:04:47 22 the '614 patent issued.

11:04:51 23 Examiner Scott -- no relation to myself -- but the
11:04:54 24 examiner of -- at least not that I'm aware -- the examiner
11:04:57 25 of the '614 patent is not the examiner on any of those

11:05:02 1 applications. Only one of those applications was disclosed
11:05:05 2 to him.

11:05:06 3 Luminati's position is, is that Examiner Scott
11:05:12 4 effectively is supposed to be aware of everything going on
11:05:15 5 in every one of those other prosecutions.

11:05:17 6 My practice -- what Mr. Harkins thinks and what I
11:05:23 7 think isn't necessarily relevant, but based on dedicating
11:05:27 8 roughly a fifth or a quarter of my career to patent
11:05:32 9 prosecution, my practice has been -- and everyone I know
11:05:34 10 who prosecutes, their practice has been that you cross-cite
11:05:38 11 every single application in a situation like this.

11:05:41 12 And the reason for that is on Slide 23. It's
11:05:45 13 not -- it's not that, you know, we all just are afraid of
11:05:50 14 our own shadow and we want to make sure that we don't
11:05:53 15 commit inequitable conduct. It's the MPEP Section 2001.06,
11:05:59 16 Subsection (b), specifically states that a person with a
11:06:03 17 duty of candor, and in this situation, that's going to
11:06:07 18 include Luminati and Luminati's patent prosecutor, cannot
11:06:12 19 assume that the patent -- that the patent examiner,
11:06:16 20 Examiner Scott here, is going to be aware of other
11:06:19 21 applications that are material (audio skips).

11:06:22 22 And so this rule applies when we've got a
11:06:26 23 situation where you've got two examiners -- or let me back
11:06:30 24 up a little bit.

11:06:31 25 You've got two patent families. You have the

11:06:33 1 exact same patent prosecutor on both patent families.
11:06:38 2 You've got the exact same co-inventors of both patent
11:06:42 3 families, but you have an examiner for one family -- that's
11:06:43 4 Examiner Nguyen in the '319 family, and then you have
11:06:48 5 Examiner Scott in the '614 family.

11:06:51 6 And (audio skips) this position was the correct
11:06:57 7 position, and Examiner Scott has to be aware in constantly
11:07:03 8 monitoring everything that's going on in the '319 family.
11:07:03 9 And while this rule applies when there's just two or three
11:07:06 10 patents in each family, if you move on to Slide 24, please,
11:07:11 11 you're going to see that this isn't a situation where
11:07:15 12 Examiner Scott could reasonably follow everything that's
11:07:18 13 going on.

11:07:20 14 You know, the -- the green box there at the
11:07:22 15 top is the '604 patent. That's what's important. That
11:07:30 16 patent, I want to say, issued some time in 2010 or maybe
11:07:33 17 2013. Everything below there, if you look down to the --
11:07:36 18 I'll call it the fourth layer where you have the '484
11:07:40 19 patent and the '319 patent and so on, every single patent
11:07:45 20 application there and below was filed after -- on or after
11:07:47 21 April 20th of 2018. That is, I want to say 18 different
11:07:52 22 patent applications that were -- that all were filed some
11:07:54 23 time between three months before the first litigation when
11:07:58 24 Luminati filed lawsuits against Oxylabs's predecessors
11:08:03 25 and -- and the day that the '614 patent issued.

11:08:06 1 If you slide down to Slide 25, you'll see present
11:08:11 2 day, they've added quite a few more.
11:08:13 3 But the issue here is that Examiner Scott cannot
11:08:17 4 be reasonably expected to keep track of every claim
11:08:21 5 amendment, every Office Action, every Office Action
11:08:24 6 response, keep track of every position that Luminati takes
11:08:28 7 in all of these co-pending applications which, you know, it
11:08:32 8 is a needle in a haystack, but it's an ever growing needle
11:08:37 9 in a haystack because these -- these additional patents and
11:08:40 10 after these additional applications are being filed on on
11:08:43 11 almost a quarterly basis.

11:08:45 12 And so the issue here is that you can't expect a
11:08:48 13 patent examiner who's already overworked and already has
11:08:54 14 hundreds of cases before him that he has to examine to keep
11:08:58 15 track of everything that Luminati is doing. The people
11:08:58 16 that are in the best position to keep track of what
11:09:01 17 Luminati is doing are Luminati's patent prosecution counsel
11:09:03 18 and Luminati's inventors.

11:09:05 19 And that's why MPEP 2006 -- sorry, 2001.06,
11:09:13 20 Subsection (e), actually exists is that you need to put
11:09:18 21 this information in front of the examiner so that he knows
11:09:20 22 that he's got to go look over at these additional
11:09:24 23 applications and see what's going on there.

11:09:26 24 THE COURT: All right. All right. Thank you for
11:09:29 25 that argument.

11:09:33 1 Counsel, we've used half of our time, and we've
11:09:36 2 just covered the first motion. I think I've heard the
11:09:39 3 kinds of arguments targeted based on my questions that I
11:09:43 4 needed to hear.

11:09:44 5 Let's move on to the second motion set for today,
11:09:49 6 and that's Luminati's motion in the alternative to sever
11:09:54 7 and stay Defendants' counterclaims, Document 125.

11:09:59 8 Let me hear from Luminati briefly on this, please.
11:10:03 9 MR. HARKINS: Robert Harkins for Luminati. Thank
11:10:08 10 you, Your Honor.

11:10:08 11 Our -- our slide presentation regarding this
11:10:12 12 starts at Slide 61 of the same set that Your Honor has.
11:10:16 13 Really, I think this comes down to, for the most part,
11:10:20 14 Slide -- Slide 62.

11:10:22 15 So this is -- you know, were these claims to go
11:10:27 16 on, it's just gotten very, very late in the day. The --
11:10:31 17 there were -- you know, this is not Luminati's decision,
11:10:35 18 but the Defendants here have filed counterclaims and
11:10:41 19 amended the counterclaims and amended them, and now they're
11:10:45 20 on the their third amended set of counterclaims. They have
11:10:49 21 not -- yes.

11:10:50 22 THE COURT: Would you agree that the Court's
11:10:51 23 decision here is purely one within the Court's discretion,
11:10:54 24 or what standard of review do you think is applicable, if
11:10:58 25 not abuse of discretion?

11:11:00 1 MR. HARKINS: No, that's the correct standard,

11:11:02 2 Your Honor. It is your discretion and your ability --

11:11:05 3 THE COURT: This is purely a --

11:11:05 4 MR. HARKINS: Sorry.

11:11:06 5 THE COURT: -- case management decision, as I see

11:11:10 6 it.

11:11:10 7 MR. HARKINS: I fully agree with you.

11:11:12 8 THE COURT: Okay.

11:11:12 9 MR. HARKINS: And the issue here is -- yeah,

11:11:15 10 absolutely.

11:11:16 11 And the issue here is that this set of

11:11:18 12 counterclaims with these additional parties hasn't even

11:11:21 13 been served, even today. And we are less than 30 days away

11:11:26 14 from the close of discovery in this case.

11:11:27 15 So even if -- and we've -- I can go through the

11:11:30 16 slides, but I -- for -- for efficiency purpose, I'll

11:11:35 17 just -- if Your Honor could review those, if you've got

11:11:35 18 questions, I would answer them.

11:11:37 19 But the reality here is we've got no indication as

11:11:40 20 to when or even whether service will ever be effectuated.

11:11:45 21 And even if they came in today and said you've got service

11:11:49 22 effectuated today, it is too late for any of the parties to

11:11:53 23 serve discovery on those claims because you have 30 days to

11:11:56 24 respond, and -- and we're less than 30 days from the close

11:11:58 25 of discovery.

11:11:59 1 And these are international parties with
11:12:02 2 international cases. We've set depositions in this case
11:12:05 3 because discovery closes on December 14th. We're booked --
11:12:08 4 we're booked on the patent claims right now already, almost
11:12:11 5 every day starting at the end of next -- at the end of next
11:12:15 6 week through the end of the schedule to deal with the
11:12:18 7 patent case.

11:12:18 8 So if, you know, yes, they're asking Your Honor in
11:12:23 9 your discretion at this point since they haven't served
11:12:26 10 the com -- the amended complaint -- the complaint that
11:12:28 11 they've got or the counterclaims, and we don't have any
11:12:31 12 time in the schedule, it would be appropriate to set those
11:12:34 13 aside if -- if they, you know, exist past the motion to
11:12:38 14 dismiss.

11:12:39 15 THE COURT: All right. What's Teso's position?

11:12:43 16 MR. CALLAHAN: Yes, sir, Chief Judge Gilstrap,
11:12:47 17 Steven Callahan here.

11:12:47 18 Let me start by saying I agree with Mr. Harkins
11:12:50 19 that this is Your Honor's call. Clearly Your Honor
11:12:55 20 possessed -- possesses discretion --

11:12:55 21 THE COURT: Mr. Callahan?

11:12:59 22 MR. CALLAHAN: -- and Your Honor can do --

11:13:01 23 THE COURT: Mr. Callahan?

11:13:02 24 MR. CALLAHAN: Yes, sir.

11:13:02 25 THE COURT: We've lost your video. I don't know

11:13:04 1 why. I'm looking at a black box. I hear you, but I don't
11:13:09 2 see you, just so you'll know.

11:13:11 3 MR. CALLAHAN: Can you see me now, Your Honor?

11:13:13 4 THE COURT: I can now. Thank you.

11:13:14 5 MR. CALLAHAN: Thank you, Your Honor. Sorry about
11:13:18 6 that.

11:13:18 7 So, yes, we agree completely. Your Honor has
11:13:21 8 probably nearly unfettered discretion here and can do as
11:13:25 9 Your Honor wishes.

11:13:27 10 I also agree that we -- we do have a -- a service
11:13:31 11 issue in terms of at least one Defendant, that's EMK.
11:13:34 12 There is a disagreement about whether Hola is or is not
11:13:38 13 effectively served. That -- that relates to whether we
11:13:44 14 could serve them with an earlier version of the complaint.

11:13:46 15 So let me just say -- Slide 32 for Your Honor,
11:13:49 16 that sets forth the chronology of the counterclaims and
11:13:53 17 what we were trying to do in terms of getting people served
11:13:56 18 and how we find ourselves here on our third amended
11:13:59 19 counterclaims.

11:14:00 20 But in terms of severance, we think that, again,
11:14:04 21 you know, bifurcation is not the usual course. Your Honor
11:14:07 22 has discretion. Single trial is usually more expedient and
11:14:13 23 efficient. And severance here is not appropriate.

11:14:15 24 Slide 34, we talk about the parties' claims and
11:14:18 25 counterclaims, and they are related -- undoubtedly related.

11:14:23 1 So we think that Luminati's argument boils down to sort of
11:14:28 2 speculation. It's if you sever and if we win on the patent
11:14:34 3 claims, then there -- there may not be another trial
11:14:38 4 needed.

11:14:38 5 At the same time, Luminati may be wrong, and
11:14:43 6 obviously two trials with the same witnesses, the same
11:14:47 7 overlapping evidence would not promote judicial economy,
11:14:52 8 especially here where the parties and party witnesses are
11:14:55 9 overseas to trial puts more burden on the Court and -- and
11:14:59 10 the jury, as well.

11:14:59 11 The only last point that I want to make besides --
11:15:03 12 well, let me make just a few more quick points.

11:15:06 13 We do think that we would suffer prejudice by a
11:15:11 14 severance, and here's why. Luminati does have these
11:15:13 15 non-patent claims for trade secret misappropriation,
11:15:19 16 computer fraud and abuse act, tortious interference and
11:15:22 17 false advertising. And so if those claims are going to get
11:15:25 18 to a jury, we do think that we should be allowed to bring
11:15:28 19 our antitrust counterclaims, sort of present the full
11:15:32 20 picture of what's going on here.

11:15:33 21 Slide 37, Courts do regularly deny bifurcation
11:15:38 22 requests. No doubt Luminati has cases going the other way,
11:15:43 23 admittedly.

11:15:43 24 And the last point I want to make on this is -- is
11:15:46 25 if Your Honor was inclined to sever these counterclaims,

11:15:50 1 which, again, we suggest Your Honor should not, but if Your
11:15:54 2 Honor was inclined, Luminati has an alternative request
11:15:59 3 which we would agree with, and that's that their non-patent
11:16:04 4 claims also be severed and stayed.

11:16:06 5 So we think that if Your Honor is going to
11:16:08 6 sever -- sever and stay anything, it should be all
11:16:13 7 non-patent claims so that the first trial in this case
11:16:16 8 would focus on the patent infringement claims and the
11:16:19 9 patent infringement claims only.

11:16:22 10 As support for that position, we do note that
11:16:25 11 those -- those non-patent claims of Luminati's were
11:16:28 12 previously asserted and dismissed without prejudice, and
11:16:31 13 that those non-patent claims are not only related to the
11:16:34 14 patent claims, involve different facts and law and would
11:16:40 15 prejudice us, we believe, before a patent infringement
11:16:42 16 jury.

11:16:42 17 THE COURT: All right.

11:16:43 18 MR. CALLAHAN: So I'll -- I'll do that portion
11:16:45 19 hopefully quickly, and I'll -- I'll be quiet now.

11:16:48 20 THE COURT: All right. Thank you for that.

11:16:49 21 Mr. Harkins, I'll give you a very brief response
11:16:56 22 if you want one. Otherwise, we'll move on.

11:16:58 23 MR. HARKINS: Thank you, Your Honor. This is
11:16:59 24 Robert Harkins.

11:17:00 25 Very brief response. Just really, that when we

11:17:05 1 discuss the monopolization and the sham litigation, you
11:17:11 2 know, discovery hasn't happened on that yet. And it's not
11:17:14 3 just a matter of proving that we -- that we win or lose the
11:17:16 4 case. If that case comes out and it turns out that, you
11:17:20 5 know, there's a basis, we've survived summary judgment,
11:17:24 6 then it probably means those monopoly claims are gone
11:17:26 7 because that's a very high bar on the sham. So it's a
11:17:31 8 further reason why (audio skips).

11:17:34 9 As to our non-patent claims, discovery has --
11:17:36 10 those were served a long, long time ago. We have been
11:17:40 11 conducting discovery on those. We'll leave that to Your
11:17:42 12 Honor's obvious discretion as to how to handle those.

11:17:47 13 Thank you.

11:17:47 14 THE COURT: Okay. Let's move on, counsel, and
11:17:49 15 take up next Teso's motion to compel interrogatory
11:17:52 16 responses. That's Document 150 in the 395 case.

11:17:56 17 Let me hear from Teso on this, please.

11:18:04 18 MR. SCOTT: Yes, Your Honor. Again, this is
11:18:06 19 George Scott for Teso. May it please the Court.

11:18:07 20 Teso seeks to compel responses to seven -- seven
11:18:15 21 interrogatories but also to really, I think, find out a
11:18:20 22 pretty simple question to -- to answer about whether or not
11:18:25 23 responsive information is being withheld pursuant to (audio
11:18:30 24 drops) and then also to have some discrete subpart
11:18:34 25 objections over a rule that we just think are just

11:18:36 1 overzealous, to be completely honest.

11:18:39 2 You know, really this comes down to -- moving on
11:18:42 3 to Slide 43 -- you know, what is the purpose of discovery?
11:18:46 4 And as the Court knows, it's -- it's to resolve some of the
11:18:49 5 issues and narrow the issues beforehand, before trial, and
11:18:53 6 to also prevent surprise at trial.

11:18:56 7 And so we have some issues here where some of
11:18:59 8 these interrogatories, I think we'd be fine with the
11:19:02 9 responses so long as once we get to trial, we don't then
11:19:07 10 later hear something completely different.

11:19:09 11 Now, moving on to -- I'll just in the interest of
11:19:17 12 time, jumping over to Slide 44, you know, we have a -- we
11:19:22 13 have a pattern here that we feel is stifling our ability to
11:19:27 14 figure out some of these issues.

11:19:29 15 You know, we've got on the one hand Luminati is --
11:19:31 16 is contending that Oxylabs can't take discovery on issues
11:19:37 17 for which it bears the burden of proof, basically
11:19:39 18 invalidity. But, on the other hand, Luminati is seeking
11:19:42 19 discovery on those exact types of issues, including damages
11:19:46 20 and infringement.

11:19:47 21 And these aren't issues like -- with respect to
11:19:54 22 damages, let's say, it's not that Luminati is asking
11:19:57 23 interrogatories like how many widgets or how much of the
11:20:00 24 service did you sell so that we can apply a reasonable
11:20:03 25 royalty to it. They're interrogatories that are literally

11:20:08 1 as broad as tell us any reason that you contend we aren't
11:20:10 2 entitled to damages. And -- and we just -- we don't think
11:20:14 3 that -- that one of those interrogatories can be allowed
11:20:17 4 while the other is disallowed.

11:20:19 5 And then to compound these issues, we have what we
11:20:23 6 feel is an improper use of Rule 33(d) to answer as many
11:20:29 7 interrogatories as possible by reference to documents, but
11:20:33 8 the -- the documents are non-responsive. You know, the
11:20:37 9 burden wouldn't be the same for us to gather the
11:20:42 10 information, to the extent it was in there. And, you know,
11:20:44 11 in some of these instances, we're talking about thousands
11:20:47 12 of pages.

11:20:47 13 And then, finally, it's these -- these subpart
11:20:51 14 objections that kind of cause an issue where, you know, for
11:20:57 15 the seven interrogatories before the Court today, the issue
11:21:00 16 that it causes is Luminati hasn't provided a substantive
11:21:02 17 response to those seven interrogatories but they also at
11:21:06 18 the same time contend that they count as 13
11:21:08 19 interrogatories.

11:21:08 20 So, you know, we're not getting responses, but
11:21:11 21 we're also -- our -- our ability to take additional
11:21:14 22 discovery is also being stifled.

11:21:16 23 I -- for Slide 45, I don't -- I don't think that I
11:21:21 24 need to provide the Court information on the bounds of
11:21:25 25 contention interrogatories. I -- I would just note that --

11:21:30 1 that Rule 33(a)(2) specifies that, you know, the Court can
11:21:35 2 delay a response to a contention interrogatory if the time
11:21:39 3 to respond to an interrogatory like that isn't -- isn't --
11:21:43 4 you know, isn't ripe yet.

11:21:45 5 But these aren't interrogatories that we filed on
11:21:47 6 the first day of open -- opening discovery. We're in a
11:21:50 7 situation now where we are, I want to say, three and a half
11:21:54 8 weeks away from the close of fact discovery, less than two
11:21:58 9 weeks away from depositions, and less than a month away
11:22:01 10 from opening expert reports. And the interrogatories that
11:22:04 11 we seek are relevant to that -- that exact issue.

11:22:07 12 So I'll move -- I'll move straight into the
11:22:12 13 interrogatories now.

11:22:15 14 Slide 47, Interrogatory No. 4. For Interrogatory
11:22:20 15 No. 4, we are -- this is -- this is a standard
11:22:27 16 interrogatory where you ask the patentee, you know:
11:22:29 17 Describe to me your conception and your reduction to
11:22:31 18 practice. Effectively, we want to know the -- we want to
11:22:34 19 know your conception story. We want to know your
11:22:37 20 pre-filing history.

11:22:39 21 You know, there -- there's two reasons to have an
11:22:42 22 interrogatory like this. One is to see if there's any
11:22:45 23 issues with, you know, on-sale bars, statutory bars, things
11:22:53 24 like that, you know, and to see if they are at least for
11:22:56 25 the pre-AIA patents claiming an earlier invention date than

11:23:01 1 the priority date on the face of the patent.

11:23:05 2 But another reason is that, you know, Luminati is
11:23:09 3 going to come to trial, we would expect, and try to present
11:23:13 4 a very rosy and thorough and detailed story of all the
11:23:19 5 things that they did to come up with these -- these
11:23:22 6 inventions that are claimed.

11:23:23 7 And the issue we have here is that -- we'll get to
11:23:29 8 with one of the other interrogatories -- is that we don't
11:23:32 9 think there's any written description support for the
11:23:34 10 claims at issue -- you know, specific parts of them -- but
11:23:41 11 at least for this -- this whole server -- this purportedly
11:23:43 12 novel server-client-server structure for surfing the
11:23:48 13 Internet anonymously.

11:23:49 14 And what we would like to find out is what is the
11:23:52 15 story? What -- what evidence do you have besides the
11:23:56 16 specification of the patent itself that the patentee was
11:24:00 17 actually in possession of the claimed invention in 2009 and
11:24:05 18 then again in 2013 for the '614 patent.

11:24:08 19 And so, we want to find that information out.

11:24:12 20 If the answer is simply we don't have anything to
11:24:16 21 say other than, you know, we -- we conceived of and reduced
11:24:20 22 the patent to -- or the invention to practice no later than
11:24:24 23 the day we filed our patent application, I think that Teso
11:24:29 24 can live with that answer.

11:24:30 25 What we don't want to have happen is to have a

11:24:32 1 completely different answer at trial. And I think
11:24:36 2 Luminati's caselaw is on point there where they say, you
11:24:40 3 know, a -- a -- you know, a party can't be compelled to
11:24:44 4 remember something that it doesn't remember. That's fine.

11:24:47 5 We just don't want there to be some fortunate
11:24:52 6 flashback of information once we get to trial, whenever
11:24:55 7 that may be. That -- that's -- that's really, you know,
11:24:58 8 the issue with interrogatory --

11:25:02 9 THE COURT: All right. Let's go on to 12 through
11:25:05 10 13.

11:25:05 11 MR. SCOTT: Moving on to -- the next group is --
11:25:10 12 it really is a group. It's Interrogatories No. 12, 13, and
11:25:16 13 14.

11:25:16 14 And here, you know, what we're asking for, we are
11:25:18 15 asking for responses to our invalidity contentions.

11:25:22 16 And, you know, we -- we've broken this up into
11:25:30 17 four -- three separate interrogatories. Luminati counts
11:25:33 18 them as four separate interrogatories but largely provides
11:25:35 19 no response to any of them.

11:25:37 20 And we have one interrogatory that asks for, you
11:25:41 21 know, a response to our contentions with respect to
11:25:45 22 anticipation and obviousness. Luminati counts that as two
11:25:48 23 interrogatories.

11:25:48 24 We have another interrogatory that asks for a
11:25:52 25 response to our contentions with respect to written

11:25:55 1 description. And then another one with respect to, you
11:25:59 2 know, subject matter eligibility.

11:26:00 3 With respect to each of these, you know,
11:26:05 4 Luminati's response is effectively -- and you can see an
11:26:10 5 example of it on Slide 49 -- it's that the patent claims
11:26:13 6 are presumed valid. The PTO went through a process to
11:26:17 7 confirm that they satisfy whatever the relevant statute is
11:26:20 8 for that interrogatory. And this is Defendants' burden to
11:26:23 9 prove.

11:26:25 10 And then for -- for each of these interrogatories,
11:26:27 11 they provide, you know, a very vague response of something
11:26:32 12 to the effect of for prior art that to do with our claim
11:26:37 13 construction positions.

11:26:38 14 For -- for the interrogatory with respect to
11:26:40 15 written description, they respond that, you know, using
11:26:44 16 Rule 33(d), take a look at the -- you know, the
11:26:47 17 specifications of the patents-in-suit.

11:26:50 18 You know, we think that that's a misapplication of
11:26:52 19 Rule 33(d) because we -- we're asking them to specifically
11:26:57 20 tell us what is your -- your specification support for
11:27:01 21 these very specific written description issues that we have
11:27:06 22 raised.

11:27:09 23 And then for -- for patent eligibility, the
11:27:13 24 response is, you know, read our briefs on the 12(b)(6)
11:27:16 25 motion to dismiss, which notably didn't involve facts

11:27:20 1 beyond those in the pleadings and our interrogatory
11:27:25 2 specifically requests to -- you know, to have them tell us,
11:27:30 3 you know, what component and what order of claims in your
11:27:35 4 claims is -- is something that wasn't understood and
11:27:38 5 routine and conventional at the time.

11:27:42 6 And, you know, because we're in a situation here
11:27:43 7 where we think that these -- these claims really read on,
11:27:49 8 you know, the HTTP standard at a very high level, and it's
11:27:53 9 just the standard sending and receiving of information
11:27:57 10 between, you know, standard components like a client and a
11:27:59 11 server, we just -- we want to know what their contention
11:28:02 12 is.

11:28:03 13 Luminati's response or position is really that
11:28:07 14 it's our burden to prove these things, and so they
11:28:10 15 shouldn't have to provide a response until their rebuttal
11:28:13 16 expert report.

11:28:14 17 But as you see in Slide 54, they take a different
11:28:19 18 position when it comes to their own interrogatories. The
11:28:22 19 first one, you know: Tell us every basis you have that you
11:28:25 20 aren't liable for infringement.

11:28:27 21 And the second is: Tell us every basis that you
11:28:31 22 aren't liable for damages.

11:28:33 23 Now, Luminati has found some caselaw on this -- on
11:28:36 24 this issue of these contention interrogatories for which --
11:28:39 25 for issues that the propounding party has the burden to

11:28:43 1 prove.

11:28:46 2 You know, the -- the first -- and we think -- we
11:28:48 3 think these cases are distinguishable but also kind of
11:28:53 4 highlight the issue here.

11:28:53 5 The first one is a case from former Chief Judge
11:28:58 6 Davis, this SFA -- SFA System versus Amazon case. And --
11:29:04 7 and if you look at that interrogatory -- and this -- this
11:29:08 8 is a case that came out before Rule 26(b) was amended, I
11:29:08 9 believe.

11:29:12 10 And if you look at that interrogatory, I think
11:29:17 11 that that really indicates why the case went the way it did
11:29:22 12 because if you read Judge Davis's opinion on this, he
11:29:25 13 doesn't cite any authority for the position that a -- that
11:29:28 14 a party with a burden of proof can't get a response to
11:29:31 15 their contentions. He just -- he cites caselaw that says
11:29:35 16 that the party -- you know, that the Defendant has the
11:29:39 17 burden of proof on invalidity.

11:29:41 18 And -- but then, you know, he -- he looks at this
11:29:45 19 interrogatory, and I believe this is just an exercise of
11:29:47 20 discretion against a -- an extremely overbroad
11:29:52 21 interrogatory, asking the patentee, you know, for every
11:29:55 22 single patent-in-suit on an element-by-element basis, tell
11:29:59 23 us what your spec support -- your specification is, how
11:30:03 24 it's enabled, and what the best mode is.

11:30:05 25 That's -- that's different from the interrogatory

11:30:07 1 that we've asked, Your Honor.

11:30:08 2 If you -- if you move back to Slide 50, you will
11:30:12 3 see that what we're asking for is a description of where in
11:30:18 4 the patent they contend the claim limitations that we have
11:30:26 5 taken issue with are supported.

11:30:28 6 And I mean, quite literally, I think that an
11:30:31 7 adequate response to this interrogatory would be to take
11:30:33 8 each of our written description defenses that we've
11:30:36 9 outlined in our -- in our invalidity contentions and simply
11:30:40 10 provide column and line numbers of what the specification
11:30:42 11 support is.

11:30:43 12 I certainly respect Luminati's right to have their
11:30:49 13 expert respond to our invalidity expert's opinion on
11:30:54 14 written description, but Luminati shouldn't be able to
11:30:57 15 withhold, you know, what it -- what it -- where in the
11:31:02 16 specification they even claim or they -- they contend these
11:31:05 17 claims are supported. That's something that we don't think
11:31:11 18 is necessarily pure expert opinion type of -- type of
11:31:15 19 information.

11:31:15 20 So -- and the -- the other case relates more to --
11:31:21 21 the other case that Luminati relies on is this -- is the
11:31:23 22 Mirror Worlds Technology versus Apple case.

11:31:28 23 And this one is more pertinent to -- to Teso's
11:31:33 24 interrogatory asking for Luminati's contention -- or
11:31:36 25 contentions in response to our prior art base invalidity

11:31:40 1 contentions, anticipation and obviousness.

11:31:44 2 And in this case, again, I believe that Mirror --

11:31:47 3 or, I'm sorry, it's versus Apple, but I think Microsoft is

11:31:50 4 actually the propounding party of this interrogatory.

11:31:53 5 In this particular case, we -- we, again, think

11:31:56 6 that this is a much broader interrogatory to what we've

11:32:00 7 propounded.

11:32:01 8 But if you move on to Slide 57, there's a couple

11:32:05 9 of interesting notes. I want to say this is another Judge

11:32:08 10 Davis case.

11:32:08 11 THE COURT: Let me --

11:32:12 12 MR. SCOTT: You know, in Footnote 2 of that

11:32:13 13 case --

11:32:13 14 THE COURT: Let me stop you, Mr. Scott.

11:32:15 15 MR. SCOTT: -- the -- the Court notes that Mirror

11:32:15 16 World --

11:32:15 17 THE COURT: Mr. Scott?

11:32:19 18 MR. SCOTT: -- explains that Interrogatory No. 7

11:32:21 19 asks them to respond to 24 charts which identify 221 --

11:32:21 20 THE COURT: Mr. Scott?

11:32:28 21 MR. SCOTT: -- prior art references and --

11:32:29 22 THE COURT: Mr. Scott, let me stop you for a

11:32:33 23 minute. Let's -- let's move on in the interest of time --

11:32:33 24 MR. SCOTT: I'm sorry, Your Honor, I cannot hear

11:32:35 25 anything that is being said. Oh, no.

11:32:39 1 THE COURT: Well, that's apparent.

11:32:48 2 MR. SCOTT: It appears that I have lost all audio.

11:32:51 3 Can the Court hear me?

11:32:54 4 THE COURT: Yes. I'll give you a hand signal.

11:32:57 5 MR. SCOTT: All right. Well, that -- that, I

11:33:00 6 guess, is half the battle. I -- would you prefer me to log

11:33:03 7 in and try to log back -- or try to log back in?

11:33:08 8 THE COURT: Well, if you can't hear me, how am I

11:33:10 9 supposed to give you instructions?

11:33:19 10 MR. SCOTT: I can't hear anything. I see lots of

11:33:23 11 laughing at me.

11:33:23 12 THE COURT: Mr. Callahan?

11:33:23 13 MR. SCOTT: I can't hear anything.

11:33:24 14 THE COURT: Do you want to take over,

11:33:26 15 Mr. Callahan? Hello? Can you hear me?

11:33:36 16 MR. SCOTT: Can you hear me now?

11:33:39 17 THE COURT: Yes.

11:33:39 18 MR. SCOTT: Okay.

11:33:41 19 THE COURT: Can you hear me?

11:33:43 20 MR. SCOTT: What about now?

11:33:44 21 THE COURT: Can you hear me?

11:33:45 22 MR. SCOTT: Yes, Your Honor, I can.

11:33:47 23 THE COURT: All right. Let's move on to

11:33:51 24 Interrogatory 16 and 17, please.

11:33:54 25 MR. SCOTT: Okay. Yes. So Interrogatory 16 and

11:34:04 1 17, you know, we're really -- 16, I guess Luminati has kind
11:34:08 2 of grouped these together, but we -- we do see them as a
11:34:12 3 little bit different.

11:34:13 4 16 -- you know, we're simply asking: What prior
11:34:17 5 art are you aware of that you have decided not to disclose
11:34:20 6 to the Patent and Trademark Office?

11:34:23 7 If -- if the answer is none, then -- then I think
11:34:25 8 we can move on. But Luminati has taken this position that,
11:34:30 9 you know, that we think is at odds with certain rules of
11:34:36 10 the manual patent examination and procedure that if they
11:34:38 11 subjectively determine that something is duplicative or
11:34:42 12 immaterial, that they don't have to -- to cite it.

11:34:47 13 And -- and we just want to know what material
11:34:49 14 hasn't been disclosed other than obviously I have a feeling
11:34:53 15 that the now something like 28 additional family members in
11:34:59 16 the '319 patent family probably have still not been
11:35:03 17 disclosed in the '614 prosecution. Maybe -- maybe that's
11:35:06 18 changed.

11:35:07 19 But that's -- that's Interrogatory No. 16.

11:35:10 20 THE COURT: 17?

11:35:11 21 MR. SCOTT: Interrogatory No. 17, this goes
11:35:16 22 directly towards our inequitable conduct claim. We -- you
11:35:19 23 know, we have a burden of showing what -- you know, most
11:35:23 24 likely, like most inequitable conduct claims is going to
11:35:27 25 be, circumstantial evidence that supports a reasonable

11:35:30 1 inference that -- that there was a specific intent to
11:35:33 2 deceive.

11:35:34 3 What we need to know -- I -- I think without
11:35:40 4 saying it, Luminati has basically told us that they did not
11:35:43 5 cite the '319 patent to the examiner. But what we want to
11:35:47 6 know is what -- what's the reason? If the reason is they
11:35:50 7 think it's immaterial, all right, we can work with that.
11:35:54 8 If the reason is that they don't think that the MPEP
11:35:57 9 applies on this issue, we can go with that.

11:36:00 10 But I think what we need is a sworn interrogatory
11:36:03 11 response that provides us this information, because, quite
11:36:07 12 frankly, I don't know where else we're going to get it
11:36:09 13 other than trying to depose the patent examiner who's in
11:36:16 14 Israel.

11:36:16 15 And on that note, you know, this isn't something
11:36:21 16 we've discussed with opposing counsel. We'd commit to put
11:36:24 17 that examiner up for a one-hour deposition. I could get
11:36:27 18 the information that way. There -- there's a lot of ways
11:36:27 19 to get this information. We just -- we just need a
11:36:27 20 response.

11:36:31 21 You know, Your Honor, just -- if I could have 30
11:36:33 22 more seconds on Interrogatory 12 --

11:36:34 23 THE COURT: Why don't you cover --

11:36:36 24 MR. SCOTT: -- on that -- on that --

11:36:36 25 THE COURT: Why don't you cover 24, and then I'll

11:36:38 1 give you 30 seconds after that on 12.

11:36:41 2 MR. SCOTT: Thank you, Your Honor.

11:36:43 3 Thank you, Your Honor.

11:36:46 4 On 24, you know, Luminati -- Luminati tells the
11:36:49 5 world effectively, you know, we're -- we're in this market,
11:36:53 6 and Luminati and Teso are the two big -- biggest players in
11:36:57 7 this market.

11:36:58 8 And Luminati tells the world that they have this
11:37:01 9 hundred percent opt-in network, and they, you know,
11:37:04 10 insinuate that they're the only ones that have it and that
11:37:08 11 that makes their product better than ours.

11:37:11 12 So the information sought here goes directly to
11:37:15 13 lost profits, we think, and whether or not Luminati's
11:37:19 14 network really complies with this purported hundred percent
11:37:22 15 opt-in.

11:37:25 16 And we've highlighted incidences where basically
11:37:31 17 individuals with cell phones and laptops and stuff like
11:37:35 18 that that use Luminati's apps aren't actually provided an
11:37:39 19 instance where they have to consent to being made an exit
11:37:43 20 node in the network.

11:37:44 21 And so, what we're asking for is, you know, where
11:37:46 22 is it in your SK's terms of service, your software
11:37:55 23 development terms of service that actually requires
11:37:57 24 somebody to do this?

11:37:58 25 And what they've provided is they provided

11:38:01 1 information that says, you know, that -- where they require
11:38:04 2 their SDK partner to do so.

11:38:07 3 But what we have a problem with is we think it's
11:38:11 4 not being policed. And we would like to know what is being
11:38:15 5 done to actually confirm that this statement is true.

11:38:18 6 THE COURT: All right. I'll give you your 30
11:38:21 7 seconds extra on Interrogatory 12 now.

11:38:26 8 MR. SCOTT: Thank you, Your Honor.

11:38:26 9 So the point being when I lost audio was that in
11:38:30 10 the Mirror Worlds case, they had 24 charts with 221
11:38:34 11 references. In this case, we have 13 charts with six
11:38:37 12 references.

11:38:37 13 Luminati is counting the interrogatory as two
11:38:40 14 interrogatories to begin with. And all we're asking -- we
11:38:44 15 think that we're within the bounds of what they should
11:38:49 16 respond to.

11:38:51 17 The Mirror Worlds case, the way it was resolved is
11:38:55 18 the parties agreed that the Plaintiff would agree to
11:38:56 19 respond to five of the charts.

11:38:58 20 If Luminati would agree to that and we could pick
11:39:01 21 which five charts, I think we could resolve that issue.

11:39:05 22 THE COURT: All right.

11:39:06 23 MR. SCOTT: Did I stay under my 30 seconds?

11:39:11 24 THE COURT: Pretty close. All right.

11:39:12 25 MR. SCOTT: Thank you, Your Honor.

11:39:12 1 THE COURT: Counsel, before I hear a response from
11:39:14 2 Luminati, we're going to take about a five-minute recess,
11:39:17 3 and then we'll come back, and then I'll hear from Luminati
11:39:20 4 in response.

11:39:20 5 The Court stands in recess.

11:39:24 6 MR. CALLAHAN: Thank you, Your Honor.

11:39:26 7 MR. HARKINS: Thank you, Your Honor.

11:48:14 8 (Recess.)

11:48:14 9 THE COURT: Welcome back. Do we have everybody so
11:48:17 10 we can proceed?

11:48:17 11 All right. Then let's return to Teso's motion to
11:48:22 12 compel interrogatory responses, Document 150 in the 395
11:48:25 13 case, and let me ask for a response from Luminati.

11:48:29 14 MR. HARKINS: Robert Harkins on behalf of
11:48:34 15 Luminati. Thank you, Your Honor.

11:48:35 16 In our slide set that we've been using today, our
11:48:39 17 response really starts at Slide 79. I -- as a -- this sort
11:48:43 18 of has an overview of the -- the interrogatories they
11:48:49 19 complained about.

11:48:49 20 So to just frame -- frame this discussion quickly,
11:48:53 21 you heard a lot about the fact that we objected to subparts
11:48:56 22 and what we're not doing.

11:48:57 23 And just to be clear about this, there's no
11:49:00 24 dispute here. Luminati did not refuse to answer an
11:49:03 25 interrogatory. We -- we did provide answers to every

11:49:05 1 single interrogatory and every single subpart.

11:49:09 2 And at this point, it's less than 30 days from the
11:49:11 3 close of discovery, and no more interrogatories have been
11:49:14 4 presented.

11:49:16 5 So the subpart issue, we think, is just mooted
11:49:19 6 anyway. But we think we did this appropriate, but we're
11:49:22 7 past the date we could receive any more interrogatories, so
11:49:26 8 we don't think that's an issue.

11:49:28 9 So we did answer the interrogatories, and we did
11:49:31 10 not withhold information on the basis that there were too
11:49:34 11 many or anything like that.

11:49:35 12 Going to -- if we look at that first one,
11:49:41 13 Interrogatory No. 4, this is -- this is just an
11:49:44 14 interrogatory asking about conception and reduction to
11:49:46 15 practice. We provided the dates for that.

11:49:48 16 If you go to Slide 80, you'll see we said at least
11:49:52 17 as early as October 8th, 2009, that is the filing date with
11:49:56 18 the provisional for that patent. And so, we weren't (audio
11:49:56 19 drops) --

11:49:56 20 THE COURT: We lost you, Mr. Harkins.

11:50:10 21 MR. HARKINS: -- not claiming an earlier date, so
11:50:13 22 as -- as far as --

11:50:15 23 THE COURT: I lost you -- I lost you --

11:50:18 24 MR. HARKINS: Hello?

11:50:18 25 THE COURT: I lost you on my end for about 10 or

11:50:21 1 12 seconds.

11:50:22 2 MR. HARKINS: Oh, okay.

11:50:22 3 THE COURT: Start over on Interrogatory 4, please.

11:50:26 4 MR. HARKINS: Right. We -- we provided an answer

11:50:32 5 that gave the dates for the conception and reduction to

11:50:35 6 practice. As to the one date, it was October 8th, 2009,

11:50:40 7 which is the filing date of the provisional.

11:50:43 8 And the other date we gave the best information we

11:50:47 9 had, and we cite this -- the Beasley case as showing that

11:51:00 10 that -- that type of answer is appropriate (audio drops) --

11:51:07 11 THE COURT: Let me stop you, Mr. Harkins.

11:51:09 12 You're -- I'm not -- I'm not hearing you.

11:51:11 13 I did hear somebody's dog bark, but you are

11:51:16 14 stopping for segments of seven, eight seconds, and then I

11:51:20 15 hear a little garbled sound, and then there's silence for

11:51:24 16 another seven or eight seconds.

11:51:26 17 MR. HARKINS: Okay. I apologize, Your Honor.

11:51:31 18 Maybe what would be best is for me to just call in very

11:51:34 19 quickly to establish a different audio.

11:51:36 20 THE COURT: That'd be fine. Why don't you do

11:51:39 21 that.

11:52:13 22 All right. We're off the record waiting for

11:52:15 23 Mr. Harkins to join us back in some form or another.

11:52:23 24 The wonderful world of virtual hearings.

11:52:28 25 Mr. Scott, while we're off the record, tell me

11:52:31 1 what that is on your wall. Are those mountains or
11:52:34 2 pyramids? I've been trying to figure it out for the last
11:52:37 3 hour.

11:52:38 4 MR. SCOTT: I'm sorry, Your Honor. These are
11:52:40 5 mountains. This is a mural that a friend painted. This
11:52:47 6 used to be my -- my son's nursery.

11:52:47 7 THE COURT: Okay.

11:52:50 8 MR. SCOTT: So as the family has grown, we've
11:52:54 9 played some roulette in this house.

11:52:56 10 THE COURT: Mr. Harkins, are you back with us?

11:52:57 11 MR. HARKINS: This is Mr. Harkins. I'm back on.
11:52:59 12 Hopefully you can hear me now.

11:53:00 13 THE COURT: I can hear you. And for some reason
11:53:03 14 we've got a frozen picture of your smiling face, so we'll
11:53:06 15 go back on the record. Why don't you continue,
11:53:08 16 Mr. Harkins.

11:53:10 17 MR. HARKINS: All right. Thank you, Your Honor.

11:53:12 18 So for Interrogatory No. 4, we provided the
11:53:15 19 conception and reduction to practice dates that we have.

11:53:19 20 For one patent set, we -- we are relying on the
11:53:22 21 filing date of October 8th, 2009. And based on input that
11:53:29 22 we have on the second one, we -- we provided the best
11:53:34 23 estimate of conception and reduction of practice in
11:53:38 24 mid-2012.

11:53:38 25 You know, so as far as being able to determine

11:53:40 1 what is relevant or not relevant prior art based on our
11:53:43 2 (beeping), we provided -- we provided that.

11:53:45 3 We cited the case Beasley versus Avery Dennison as
11:53:50 4 showing that that is an appropriate way to go about
11:53:55 5 responding to this -- this type of request.

11:53:57 6 And I will say further, to the extent that there
11:53:59 7 was a discussion of wanting to get a fuller story about the
11:54:03 8 invention, in this instance, we have also agreed to be able
11:54:09 9 to rely on depositions that were provided in the last case.
11:54:15 10 And those inventors -- named inventors of the patents in
11:54:17 11 this case were deposed in the last case.

11:54:22 12 So it's not like they are lacking for information
11:54:25 13 about -- about the invention story and what was done that
11:54:29 14 led to the '614 patent, for example.

11:54:32 15 And the -- and they're going to have an
11:54:34 16 opportunity in a couple weeks here to talk to these
11:54:36 17 inventors again and -- and fill in whatever they think they
11:54:39 18 need to fill in as far as the invention story regarding the
11:54:42 19 earlier patents.

11:54:43 20 And I will note that the earlier patents were
11:54:45 21 discussed even in the depositions that were previously
11:54:48 22 taken because that was asserted as prior art in the last
11:54:51 23 case.

11:54:51 24 THE COURT: Let's -- let's go on -- let's go on --
11:54:54 25 MR. HARKINS: We think that --

11:54:55 1 THE COURT: -- let's go on to Interrogatories 12
11:54:57 2 through 14, please.

11:54:58 3 MR. HARKINS: Okay. So, you know, these are --
11:55:02 4 these are situations in which we -- you know, everybody --
11:55:06 5 I've been involved in many of these -- many patent cases,
11:55:10 6 and everybody always asks people to provide information to
11:55:14 7 respond to things they're required to do under the patent
11:55:16 8 rules.

11:55:16 9 And people give some response, and it's usually a
11:55:20 10 version of, you know, it's your burden of proof, and you
11:55:23 11 need to -- we don't think you've met it, and you need to do
11:55:25 12 a better -- you need to do better or more.

11:55:28 13 And -- and in that instance -- you know, so let's,
11:55:33 14 for example, discuss that we, Luminati, have made a request
11:55:35 15 for them to tell us why we don't -- why -- why -- you know,
11:55:44 16 they (beeping) -- well, the response that we got for why
11:55:47 17 they don't infringe was a version of because we think your
11:55:50 18 patent claims are invalid and because you didn't meet your
11:55:56 19 burden of proving that we infringe. There was no charging
11:55:59 20 done or anything like that. That is -- this happens in
11:56:04 21 every patent case.

11:56:05 22 You'll -- you'll note that -- you'll note that --
11:56:08 23 that Mr. Scott didn't say they have any law to support
11:56:11 24 their position that we need to respond or give more
11:56:15 25 information than we provided.

11:56:16 1 Instead, we cited the only law cited as to this
11:56:19 2 issue, and it in both cases went our way, and -- and
11:56:22 3 Mr. Scott was trying to distinguish those cases.

11:56:23 4 But the reality is that the -- the type of
11:56:26 5 responses that we've given, given that we don't have the
11:56:30 6 burden of proof, and -- and we disagree with the assessment
11:56:32 7 that has been made, are appropriate.

11:56:34 8 The -- the other thing I will say here is that --
11:56:38 9 and if we -- and do we have Slides 81 through 86 that --
11:56:47 10 that deal with these issues.

11:56:48 11 But really this is premature, and we heard about
11:56:52 12 these charts -- we heard about these charts that have --
11:56:55 13 that have been served on us.

11:56:57 14 We received 791 pages of invalidity contentions in
11:57:00 15 this case. So we don't know what they're going to end up
11:57:05 16 relying on. There was a funnel process that we're all
11:57:08 17 familiar with.

11:57:09 18 We think that the attacks would force us to give
11:57:12 19 them more information about things that they have a burden
11:57:15 20 on is premature and not supported by the practice in really
11:57:19 21 any of the courts that I practice any patent law in.

11:57:21 22 With response to the eligibility issue, they --
11:57:21 23 that has been briefed in this -- in this court.

11:57:30 24 You know, that -- that is already -- we -- we
11:57:30 25 stated our position. These are not facts that the company

11:57:33 1 has. These are legal positions.

11:57:35 2 And in this case, because of the Court's rules
11:57:41 3 regarding the situation, we've already briefed this issue.

11:57:43 4 Not only that, but as far as other issues
11:57:45 5 regarding support for the claims and what they mean, we
11:57:48 6 just did a Markman hearing two days ago where all of that
11:57:53 7 was briefed and set out.

11:57:53 8 And I -- Mr. Toliver from -- from Mr. Scott's firm
11:57:56 9 and I spent the better part of three hours and maybe more
11:58:00 10 with Magistrate Judge Payne talking about these issues
11:58:00 11 and -- and setting out our legal positions.

11:58:02 12 So in that situation, we don't understand why
11:58:06 13 there would be an obligation for us to do any more than
11:58:09 14 we've done as far as responding to these interrogatories.

11:58:12 15 And we're -- we're sort of nearing the -- the end
11:58:15 16 of discovery, and we're going to be issuing expert reports,
11:58:18 17 and -- and we're going to be rebutting them.

11:58:19 18 And once we know what it is they're really relying
11:58:22 19 on out of that 791 pages, you know, we will be responding
11:58:26 20 accordingly.

11:58:27 21 And that's what we expect them to do with -- with
11:58:30 22 response to our infringement contentions. And that's why
11:58:34 23 we're not moving to compel their response, even though they
11:58:37 24 didn't chart responses.

11:58:38 25 We know the patent rules don't require charting

11:58:42 1 and don't require that level of specificity for the party
11:58:45 2 that doesn't have the burden of proof.

11:58:46 3 THE COURT: All right. How about Interrogatory 16
11:58:48 4 and 17?

11:58:49 5 MR. HARKINS: Okay. For 16 and 17, they just --
11:58:52 6 16 -- this is Slide 87 of our set.

11:58:56 7 It just asked when -- when we knew about the prior
11:58:59 8 art references and whether they were disclosed and what --
11:59:02 9 and we're relying on the disclosures that we made. We
11:59:05 10 don't have independent -- like recollection.

11:59:07 11 Mr. Scott pointed out -- or in the last
11:59:10 12 presentation that there is a lot of patent activity going
11:59:14 13 on with Luminati.

11:59:15 14 He -- he showed -- I think some of the slides
11:59:18 15 showed 20 or even 30 different applications pending at
11:59:22 16 various points related to one family that -- that was
11:59:26 17 discussed here.

11:59:27 18 So we've -- we've -- you know, our people at the
11:59:29 19 company, they rely on their patent attorneys. They send
11:59:32 20 the information out, the information gets disclosed, it
11:59:35 21 becomes a matter of the record, and -- and we're relying on
11:59:38 22 that record in response to 16 and 17.

11:59:42 23 Like that is what we did. We -- we -- we
11:59:45 24 disclosed what we disclosed in the record. And if it
11:59:49 25 wasn't in the record, then it was -- then it wasn't --

11:59:50 1 obviously, wasn't disclosed.

11:59:52 2 So I'm not sure what else there is to be said in
11:59:55 3 response to that -- those -- those interrogatories.

12:00:00 4 There was no decision made to withhold anything.

12:00:03 5 It's just what was disclosed was disclosed. And so, that
12:00:07 6 was the answers for 16 and 17.

12:00:09 7 THE COURT: All right. How about 24, what's your
12:00:11 8 position?

12:00:12 9 MR. HARKINS: Yes. So 24, if you look at the
12:00:15 10 interrogatory, this is on Slide 89. It says: Describe
12:00:18 11 with particularity whether your residential network is
12:00:21 12 100 percent opt-in, complying with all laws and
12:00:27 13 regulations, and include in your answer an identification
12:00:29 14 of all apps or programs that you have included your SDK --
12:00:37 15 and -- that have included your SDK and identify where in
12:00:37 16 such apps or programs terms or conditions or similar terms
12:00:41 17 or conditions have included an opt-in provision.

12:00:41 18 So we -- we have a lot of -- so what we did -- we
12:00:46 19 were talking about a very large set of documents.

12:00:48 20 They want us to prove everything we've ever done
12:00:51 21 complies with laws and regulations. And so, what we did
12:00:54 22 was we provided information showing our user and license
12:00:59 23 agreement that has opt-in compliance.

12:01:03 24 We've identified the apps or programs that include
12:01:05 25 our SDK and provided copies of those. And we identified

12:01:11 1 terms and conditions that show that there's opt-in.

12:01:15 2 And -- and we've given -- you know, we cited 33(d)

12:01:20 3 for a lot documents that relate to this because it's such a

12:01:21 4 broad and encompassing interrogatory.

12:01:23 5 But it's not like we refused to answer the

12:01:26 6 interrogatory. We -- we absolutely answered the

12:01:29 7 interrogatory.

12:01:29 8 THE COURT: All right. Mr. Scott, do you have a

12:01:36 9 brief reply?

12:01:38 10 MR. SCOTT: Yes, Your Honor, a brief reply.

12:01:44 11 Honestly, I think I'll just limit the brief reply

12:01:50 12 to Interrogatories 12 through 14, and then just one quick

12:01:54 13 point on the protective order and confidential (beeping).

12:01:59 14 With respect to 12 and 14, we -- we disagree that

12:02:02 15 the Mirror Worlds case went their way. Like I said, it was

12:02:05 16 resolved in -- with the Plaintiff agreeing to provide

12:02:11 17 responses to five charts.

12:02:12 18 And other than that, we just -- we don't think

12:02:16 19 that they have caselaw that provides a basis other than --

12:02:20 20 other than the one -- Judge Davis's decision which very

12:02:25 21 much appears to be a discretionary decision, so we would

12:02:31 22 say it's within Your Honor's discretion to -- whether or

12:02:35 23 not to compel a response to these interrogatories.

12:02:37 24 But we -- we do think there should be at least

12:02:38 25 some sort of middle ground and get some type of response.

12:02:42 1 But to the extent that we aren't required -- or
12:02:45 2 that they aren't required to respond to 12 -- to
12:02:48 3 Interrogatories 12 and 14, I think what I'm hearing from
12:02:52 4 Mr. Harkins is that they aren't expecting a response from
12:02:56 5 us to Interrogatories 13 and 15 either.

12:02:58 6 I -- I guess if that's -- if that's the way the
12:03:01 7 Court rules, then that -- that would be the way to handle
12:03:05 8 it.

12:03:05 9 In terms of -- just real quickly on the protective
12:03:12 10 order and confidentiality objections -- this is my
12:03:15 11 Slide 64 -- you know, we've -- we've -- we've received --
12:03:21 12 we think we've received the information from them, but --
12:03:25 13 but, you know, they -- they make this statement in the
12:03:27 14 joint -- in the joint report we sent to the Court, Luminati
12:03:30 15 has represented that it is withholding relevant
12:03:34 16 information, including this BI Science material.

12:03:37 17 And really we're just wondering, you know, what
12:03:40 18 other relevant information is Luminati withholding. And if
12:03:43 19 it isn't, can it just say so, and then we can put that
12:03:47 20 issue to bed.

12:03:48 21 Thank you, Your Honor.

12:03:49 22 THE COURT: All right. Thank you, counsel.

12:03:50 23 We're at 12:00 o'clock, counsel, but let me ask
12:03:59 24 this. We've not taken up Luminati's motion to dismiss
12:04:04 25 Teso's amended complaint, Document 20, on the 73 case.

12:04:08 1 It's apparent to the Court that a lot of the
12:04:12 2 arguments here are going to be duplicative of the arguments
12:04:19 3 that I heard on the first motion that we began with,
12:04:24 4 Luminati's motion to dismiss.

12:04:28 5 I'm happy to address this on the papers unless
12:04:32 6 anybody feels there's something very unique and very
12:04:34 7 important that's buried in this motion that we haven't
12:04:37 8 touched on otherwise and you want to take a minute apiece
12:04:44 9 or two minutes apiece and touch on it.

12:04:46 10 Is everyone satisfied that this is effectively
12:04:49 11 subsumed in our earlier arguments, or does anybody contend
12:04:53 12 there's something unique and not otherwise addressed that
12:04:55 13 the Court needs to hear from you on very briefly on this
12:04:59 14 motion?

12:04:59 15 MR. HARKINS: So this is Robert Harkins on behalf
12:05:04 16 of Luminati, the movant on this.

12:05:07 17 We would agree that the entire discussion of
12:05:11 18 Noerr-Pennington and sham, it relates here. The claims are
12:05:14 19 still based on patent enforcement activities. So that is
12:05:18 20 an overlap.

12:05:21 21 We have made arguments obviously in the briefs,
12:05:24 22 and we have put them in our slide set -- the second slide
12:05:29 23 set, at Slides 26 through 33 as to why independently of
12:05:34 24 Noerr-Pennington, those types of claims like Lanham Act,
12:05:38 25 patent false marking, tortious interference, that there's

12:05:42 1 no claim -- business disparagement and defamation that they
12:05:47 2 failed to make a claim.

12:05:48 3 We -- the discussion about those claims, if Your
12:05:50 4 Honor would like to review those slides and their competing
12:05:54 5 slides and -- and rule on the papers, we would be willing
12:05:57 6 to do that.

12:05:57 7 THE COURT: I've -- I've made a note of those
12:05:59 8 particular slides you mentioned.

12:06:00 9 Anything from Teso on this?

12:06:03 10 MR. SIBLEY: This is Mitchell Sibley from Teso,
12:06:03 11 Your Honor.

12:06:08 12 We're satisfied the briefing -- we have slides, as
12:06:13 13 well, that discuss -- that counter the argument that
12:06:15 14 Luminati just made that provides support and citations to
12:06:18 15 where we -- where we cite facts in our complaint. And we
12:06:22 16 would rest on our briefing and on those slides, as well.

12:06:25 17 THE COURT: All right. Thank you, Mr. Sibley.

12:06:27 18 Counsel, my inclination is to go back and give you
12:06:32 19 some high-level guidance verbally and on the record just
12:06:36 20 because I think both parties would benefit from that at
12:06:42 21 this juncture without a delay.

12:06:44 22 My intention, however, lest there be -- lest there
12:06:48 23 be any doubt, is to follow today's hearing with a written
12:06:52 24 order memorializing the precise nature and basis for the
12:06:56 25 rulings that I'm going to give you.

12:06:57 1 You should take both what I'm telling you now on
12:07:01 2 the record and what you see in my following written order
12:07:04 3 as the Court's complete guidance on these issues, but I
12:07:08 4 don't see any merit to making you wait.

12:07:13 5 And I'm not purporting that this will be
12:07:15 6 absolutely everything you'll see in the written order. But
12:07:18 7 as I say, I want to give you high-level, broad-based
12:07:21 8 guidance at this point.

12:07:23 9 So with that, on -- on Luminati's motion to
12:07:29 10 dismiss third amended counterclaims and third amended
12:07:33 11 third-party complaint, Document 102 in the 395 case, I'm
12:07:38 12 going to deny Luminati's motion based on Noerr-Pennington
12:07:42 13 immunity.

12:07:44 14 I think whether or not this is a sham patent
12:07:49 15 litigation at this pleading stage is premature.

12:07:54 16 I'm going to deny Luminati's motion with regard to
12:07:57 17 the monopolization and attempted monopolization claims.

12:08:02 18 However, I'm going to grant Luminati's motion with
12:08:06 19 regard to the combination and conspiracy claims in Count 3
12:08:10 20 and the conspiracy to monopolize claims in Count 4,
12:08:14 21 primarily because I -- I do not find that there are
12:08:18 22 separate decision makers involved. It appears to be one --
12:08:22 23 in reality one combined actor.

12:08:27 24 I'm going to deny the motion on the breach of
12:08:31 25 contract counterclaim. I think Teso, Oxy -- Oxylabs,

12:08:37 1 whoever we want to call them, has pled sufficient facts to
12:08:41 2 meet the Twombly standard at this juncture.

12:08:45 3 And I'm going to deny the motion on the
12:08:47 4 inequitable conduct counterclaim. I think there have been
12:08:52 5 sufficient facts pled to support at least a reasonable
12:08:56 6 inference of the intent necessary -- intent to deceive
12:09:00 7 necessary here.

12:09:01 8 On Luminati's motion in the alternative to sever
12:09:08 9 and stay, Document 125 in the 395 case, I'm going to deny
12:09:12 10 that motion within the Court's discretion as a matter of
12:09:18 11 case management.

12:09:18 12 With regard to the motion to compel, Document 150,
12:09:24 13 in the 395 case, with regard to Interrogatory 4, in a
12:09:33 14 general sense I'm going to deny this, but I want to make it
12:09:36 15 clear Luminati cannot rely on its "at least as early as"
12:09:43 16 answer as a basis to later claim an earlier date for
12:09:49 17 conception and reduction to practice.

12:09:51 18 If you're going to claim an earlier date for
12:09:54 19 conception and reduction to practice, you're going to have
12:09:57 20 to say so specifically. This kind of general disclaimer of
12:10:01 21 "at least as early as" does not open the door to that in
12:10:03 22 the Court's view.

12:10:04 23 Regarding Interrogatories 12 through 14, I'm
12:10:07 24 aware -- I'm aware that on Tuesday of this week, the
12:10:12 25 parties argued claim construction to Magistrate Judge

12:10:16 1 Payne.

12:10:16 2 I would simply say that I think there is a good
12:10:19 3 chance, based on the resulting claim construction order
12:10:24 4 that he will put out, that there'll be a need to supplement
12:10:27 5 here, and I expect the parties to supplement as mandated or
12:10:30 6 necessitated by the claim construction order.

12:10:34 7 On 16, I -- I believe -- I'm persuaded that this
12:10:41 8 request is overbroad. I'm going to deny the motion.

12:10:47 9 With regard to 17, I really don't see that there's
12:10:51 10 any reason to believe Luminati has more information than it
12:10:55 11 has disclosed with the answer it's given.

12:10:59 12 But I want to make it clear to Luminati, if that's
12:11:02 13 not the case, you have a duty to supplement. And I'm going
12:11:04 14 to enforce that duty to supplement, both now and as
12:11:07 15 additional information may come to light going forward.

12:11:09 16 And with regard to Interrogatory 24, essentially,
12:11:17 17 I'm going to deny this. But to the extent there are any
12:11:20 18 opt-in provisions presented to users as opposed to SDK
12:11:27 19 partners, Luminati has got to produce those and disclose
12:11:30 20 all that.

12:11:30 21 With regard to the dispute about confidential
12:11:42 22 information, it's unclear to me from the responses given
12:11:45 23 what remaining responses might be prohibited by the BI
12:11:50 24 Science or BI Science protective order.

12:11:56 25 Here, again, there's a continuing obligation to

12:11:58 1 supplement. And to the extent that there are -- there are
12:12:03 2 other responses necessary, I'll expect those to be
12:12:05 3 supplemented.

12:12:07 4 I think the discrete subpart issue may well be
12:12:11 5 moot given where we are, but to the extent it's not, I
12:12:17 6 don't find that any of the interrogatories objected to
12:12:21 7 contain discrete subparts. It's my belief that all the
12:12:26 8 subparts were related, if that guidance is helpful to you.

12:12:30 9 With regard to the motion to dismiss in
12:12:33 10 the 73 case, I think you will probably have a good idea
12:12:38 11 from what I've already told you where my ultimate rulings
12:12:42 12 will be there.

12:12:42 13 But given that I'm going to review further and
12:12:45 14 take up this motion on the papers, you should look to my
12:12:49 15 written order for precise guidance in this regard.

12:12:52 16 With that, counsel, that should be hopefully some
12:12:59 17 high-level guidance that will allow you to move forward
12:13:02 18 immediately without any delays waiting on the Court to
12:13:05 19 provide you a written order, although you can look for a
12:13:08 20 written order with these and additional details laid out as
12:13:11 21 soon as I can feasibly get to it and get it out the door.

12:13:15 22 Unless there's something further, that will
12:13:17 23 complete the hearing before the Court this morning.

12:13:21 24 Despite the glitches, we were able to get through
12:13:26 25 everything. I thank you for your argument, and you are

12:13:29 1 excused.

12:13:31 2 MR. HARKINS: Thank you, Your Honor.

12:13:32 3 MR. CALLAHAN: Thank you, Your Honor.

12:13:33 4 MR. SCOTT: Thank you, Your Honor.

12:13:39 5 MR. SIBLEY: Thank you, Your Honor.

6 (Hearing concluded.)

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CERTIFICATION

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3 I HEREBY CERTIFY that the foregoing is a true and
4 correct transcript from the stenographic notes of the
5 proceedings in the above-entitled matter to the best of my
6 ability.

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9 /S/ Shelly Holmes _____ 11/20/2020
10 SHELLY HOLMES, CSR, TCRR Date
10 OFFICIAL REPORTER
11 State of Texas No.: 7804
11 Expiration Date: 12/31/20

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